Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PENOBSCOT NATION; PASSAMAQUODDY TRIBE; BARRY L. DANA, in his capacity as Chief of the Penobscot Nation; RICHARD M. DOYLE, in his capacity as Governor of the Passamaquoddy Tribe; and RICHARD STEVENS, in his capacity as Governor of the Passamaquoddy Tribe,

Petitioners,

v.

GEORGIA-PACIFIC CORPORATION; GREAT NORTHERN PAPER, INC.; INTERNATIONAL PAPER COMPANY; and the STATE OF MAINE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

RIYAZ A. KANJI
KANJI & KATZEN, PLLC
201 South Main Street
Suite 1000
Ann Arbor, Michigan 48104
(734) 769-5400

KAIGHN SMITH, JR., ESQUIRE
Counsel of Record
GREGORY W. SAMPLE
DRUMMOND WOODSUM & MACMAHON
245 Commercial Street
Portland, Maine 04101
(207) 772-1941
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether this Court's equitable rule of vacatur required the First Circuit to vacate district court rulings when the Circuit had concluded, under principles of *res judicata*, that the Maine Supreme Judicial Court had, by winning a race to judgment, rendered the Petitioners' federal case superfluous and thereby made it unnecessary for the Circuit to address the decisions the Petitioners sought to have reviewed on appeal.

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STATEMENT OF JURISDICTION

On June 20, 2001, the United States Court of Appeals for the First Circuit entered judgment in *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317 (1st Cir. 2001). Petitioners timely filed a Petition for Rehearing and Rehearing En Banc on July 3, 2001, and on August 24, 2001, that court denied that Petition. This Court has jurisdiction to review the judgment of the First Circuit and its order denying the Petition for Rehearing pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . . . " U.S. Const. art. III, § 2.

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Introduction and Summary

This Court consistently has confirmed that it is the "duty" of the circuit courts of appeals, under this Court's long-standing equitable rule of vacatur, to vacate rulings of the federal district courts that appellants have sought to review on appeal when circumstances beyond the appellants' control prevent such review. Because the First Circuit did not adhere to that duty in this case, and its rejection of the rule conflicts with its application in circuits, the writ of *certiorari* must issue.

Petitioners, the Penobscot Nation and the Passamaquoddy Tribe ("Petitioners" or the "Tribes"), sought to invoke the subject matter jurisdiction of the United States District Court for the District of Maine pursuant to 28 U.S.C. § 1362 (controversies involving federal rights of Indian tribes) and 28 U.S.C. § 1331. The district court, however, dismissed their action for want of subject matter jurisdiction under the "well-pleaded complaint rule." On appeal to the First Circuit, the Tribes were unable to obtain review of the district court's decisions barring their access to the federal court. According to the First Circuit, it was unnecessary for it to address those decisions because an intervening state court decision, arising out of a case filed by the Tribes' federal court adversaries, rendered the Tribes' case in the district court "superfluous." Nevertheless, the First Circuit, rejecting the

Tribes' rehearing petition, refused to vacate the district court's judgment and left that court's decisions, barring the Tribes from invoking its subject matter jurisdiction, fully intact. Those decisions, therefore, stand against the Tribes for the future.

As set forth below, under this Court's vacatur rule, the Tribes cannot, as a matter of equity, be forced to live under the cloud of the district court's unreviewed decisions and the First Circuit's rejection of the rule conflicts with its application in other circuits. Proper application of the rule is all the more important because the issue left unreviewed on appeal involves the district court's duty, under the Constitution, to provide a federal forum to suitors pursuant to congressional mandate. In this case, the Tribes have been deprived, through no fault of their own, from attaining an appellate decision on that duty. The writ should, therefore, issue in this case. Furthermore, because the First Circuit's error is clear, summary disposition is appropriate. Thus, the Court should grant the writ, vacate the First Circuit's judgment, and remand the case with instructions to vacate the district court decisions.

Background

This case arose when Respondents, three Maine paper manufacturers, Georgia-Pacific Corp., Great Northern Paper, Inc., and Champion International Corporation (now owned by International Paper Company) (collectively the "Corporations" or "Respondents") sought to impose a state regulatory law governing public access to the records of Maine's agencies and political subdivisions

(the Maine Freedom of Access Act, 1 Me. Rev. Stat. Ann. tit. 1, §§ 401-410 (the "MAA")) upon the Penobscot Nation and the Passamaquoddy Tribe.

The Petitioner Tribes are riverine peoples, historically dependent upon sustenance fishing and other river resources within their respective aboriginal territories: the watersheds of the Penobscot River and the St. Croix River. *See* S. Rep. No. 96-957, at 11; H.R.Rep. No. 96-1353, at 11, *reprinted in* 1980 U.S.C.C.A.N. 3786, 3787. The Respondents discharge waste effluent from paper mills within these watersheds, affecting water and other natural resources within or near tribal reservations and territories. *See* Appendix, *Penobscot Nation v. Georgia-Pacific Corp.*, 1st Cir., Docket No. 00-2265 (hereinafter "A.") 37-38. They have been adverse to the Tribes or the United States, as trustee for the Tribes, in a variety of environmental proceedings. *See, e.g., In re: Great Northern Paper, Inc.*, 85 FERC ¶ 61,316, ¶ 61,184, 77 FERC ¶ 61,066, ¶ 61,068; *In re: Georgia-Pacific Corp.*, 91 FERC ¶ 61,047; *In re: State of Maine's Application for Federal Regulatory Authority Under the National Pollutant Discharge Elimination System*, 65 Fed. Reg. 39,899-00; 65 Fed. Reg. 47,989-90.

By letters dated May 10, 2000 to the Tribes' leaders, the Corporations invoked the MAA, and demanded to inspect and copy broad categories of records (including computer files) within the Tribes' "possession or custody" "in any way related to" efforts by the Tribes to study, protect, or regulate water or other natural resources. A. 14-15. The Corporations claimed a right to invoke the MAA against the Tribes pursuant to a provision of the Maine Act to Implement the Indian Claims Settlement, Me. Rev. Stat. Ann. tit. 30 §§ 6201-6214 (West)

(the "Maine Implementing Act"), which was approved and made effective by Congress pursuant to the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (the "Settlement Act").

The provision in question states, in pertinent part, as follows:

> [T]he Passamaquoddy Tribe and the Penobscot Nation . . . shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that *internal tribal matters, including* membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, *tribal government*, tribal elections and the use or disposition of settlement fund income *shall not be subject to regulation by the State.*

Me. Rev. Stat. Ann. tit. 30, § 6206(1) (emphasis added), *ratified by* 25 U.S.C. § 1725(b)(1).

Since this provision became effective only upon Congress' exercise of its constitutional plenary authority over Indian affairs (*see* U.S. Const. art. I, § 8, cl. 3) in ending the Tribes' historic land claims against Maine (*see* 25 U.S.C. § 1731), and it "determin[es] the scope of tribal sovereignty" of the Petitioner Tribes, its construction presents a federal question. *Penobscot Nation v. Fellencer*, 164 F.3d 706, 708-09 (1st Cir.), *cert denied*, 527 U.S. 1022 (1999). *See Grayson v. Harris*, 279 U.S. 300, 303 (1929).[1]

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[1] The combined federal and state settlement acts are a modern-day, tripartite treaty between Congress (acting on behalf of the Tribes), the State of Maine, and the Tribes. *See*

In their MAA demand letters, the Corporations ignored the prohibition against state regulation of "internal tribal matters" in the second phrase of section 6206(1) and argued a simple syllogism: (1) pursuant to the first phrase, imposing municipal "duties and obligations" upon the Tribes, the Tribes are subject to State laws governing Maine's "political subdivisions"; (2) the MAA, by its terms, provides public access to the "public records" of the State's political subdivisions, *see* Me. Rev. Stat. Ann. tit. 1, §§ 401(2), 402(3); therefore, (3) the Tribes must allow the Corporations to inspect and copy tribal records under the MAA. A. 14, 17, 20. Armed with this construction of section 6206(1), as confirmed by Congress under the Settlement Act, the Corporations claimed that their MAA demand letters invoked immediately enforceable MAA rights in their favor against the Tribes: (1) a right of immediate access to the Tribes' governmental records inside the reservations and (2) an immediate right

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Antoine v. Washington, 420 U.S. 194, 199-202 (1975) (describing Congress' substitution of federal enactment for treaty-making as of 1871). Congress declared that it approved the Maine Implementing Act in "a good faith effort . . . to provide the Passamaquoddy Tribe [and] the Penobscot Nation . . . with a fair and just settlement of their land claims." 25 U.S.C. § 1721(a)(7). Congress' extinguishment of those claims against Maine was the *quid pro quo* for giving legal force to the provision at issue; the Maine Implementing Act, by its terms, became "effective *only upon the enactment of legislation by the United States . . . discharging all claims in pending litigation brought by the United States against the State of Maine on behalf of the Passamaquoddy Tribe and the Penobscot Nation, . . .* and ratifying *and approving this Act* without modification." 1979 Me. Laws, ch. 732, § 31 (emphasis added).

to proceed to the Maine Superior Court if denied such access. They wrote:

> The [M]AA requires that public records be made available for public inspection. 1 M.R.S.A. § 408. With limited exceptions not relevant here, public records include all records "in the possession or custody of an agency or public official of this State or any of its political subdivisions". . . . *Id.* § 402(3).
>
> * * *
>
> Pursuant to the requirements of the [M]AA, you are required to make the requested records available during regular business hours. 1 M.R.S.A. § 408. If you intend to deny this request, *you are required to notify us within five working days of your receipt of this letter.* 1 M.R.S.A. § 409(1).

A. 14, 16 (emphasis in original).[2]

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[2] Section 408 of the MAA declares, in pertinent part, that "every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record." Me. Rev. Stat. Ann. tit. 1, § 408. "Public records" are defined, as "any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of any agency or public official of this State or any of its political subdivisions. . . . *Id.* § 402(3). Section 409 provides for judicial review of the action of a state "body or agency or official" in responding to a given MAA access demand. *See id.* § 409(1). "Any person aggrieved" by a denial of a request "may appeal therefrom" to "any Superior Court within the State," and the court is to give the matter priority for "trial." *Id.* If the court,

The Tribes responded that as Indian tribal governments, they governed "public access" to records within their reservations on their own terms and were not subject to state regulation of such matters. A. 52-54. They offered, however, to provide the corporations with documents not privileged from disclosure under their own tribal rules or standard privileges, noting that the Corporations were their legal adversaries in matters concerning the Corporations' use of waters affecting them. *Id.*

With the controversy framed and escalating without resolution, the Tribes filed an action for declaratory and injunctive relief against the corporations in the United States District Court for the District of Maine on May 18, 2000. A. 9-22. Attaching the Corporations' MAA demand letters to their Complaint, the Tribes claimed a federally-protected right, as confirmed by Congress under the Settlement Act, to govern public access to their reservation records "free from state jurisdiction." A. 10-11. They asked for a declaratory judgment that, pursuant to the protections afforded by Congress, they were free from the Corporations' MAA demands, and they asked the district court to enjoin the Corporations from continuing to proceed under the MAA against them in violation of their federally-protected rights. A. 10-12. The Tribes invoked federal court jurisdiction pursuant to 28 U.S.C. § 1362 and 28 U.S.C. § 1331, A. 10, which are set out verbatim above.

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after de novo review, "determines such denial was not for just and proper cause, it shall enter an order for disclosure." *Id.*

Four days later, on May 22, 2000, the Corporations filed a single count "Complaint Under Maine's Freedom of Access Act" against the Tribes in the Maine Superior Court pursuant to Me. Rev. Stat. Ann. tit. 1, § 409(1). A. 36-54. As in their MAA demand letters, they claimed that they could proceed against the Tribes because the Settlement Act rendered them subject to the MAA as "political subdivisions" of Maine. *Id.* They claimed that the Tribes had violated the MAA by failing to allow them to inspect and copy tribal records pursuant to their May 10, 2000 letters, and they demanded an order requiring Petitioners "to permit the [corporations] to inspect and copy each and every document" set forth in their May 10, 2000 demands. A. 39-40.

The State of Maine intervened in both the Tribes' federal action and in the Corporations' state court action, claiming an interest because the cases posed significant questions concerning "the jurisdictional relationship between the State and the Tribes." *Penobscot Nation v. Georgia-Pacific Corp.*, 1st Cir., Docket No. 00-2265, Record Item No. (hereinafter "R. No.") 8 at 2. The Tribes now confronted a concerted effort by the State and the Corporations to win a race to judgment in the state court.

In the face of the Tribes' motions for a preliminary injunction and for summary judgment in the federal district court, the Corporations (supported by the State), immediately sought "partial summary judgment" in their state court MAA action, arguing that by virtue of the municipal "duties and obligations" clause of section 6206(1), the Tribes were fully subject to the MAA as if political subdivisions of Maine. *See* R. No. 33. The Corporations pushed the state court to reach a quick decision

under a threat of mandamus pursuant to a speedy trial provision of the MAA. *See* Addendum *Appellants' Petition for Rehearing and Rehearing En Banc, Penobscot Nation v. Georgia-Pacific Corp.*, 1st Cir., Docket No. 00-2265 (hereinafter "Pet. Add.") 7-8. The Tribes asked the state court to stay proceedings in favor of their first-filed federal case, but met vigorous opposition from the Corporations and the State. *See* Pet. Add. 1-5; A. at 64. Unable to obtain the requested stay, the Tribes opposed the Corporations' MAA summary judgment motion and moved to dismiss the case for lack of subject matter jurisdiction on ground that public access to their reservation records was an "internal tribal matter" protected from state control, as a matter of federal law. *See* R. No. 33.

In the federal district court, the Corporations (supported by the State), opposed the Tribes' motions and moved to dismiss, claiming, *inter alia*, that the Tribes' Complaint violated the "well-pleaded complaint rule," and therefore the district court lacked subject matter jurisdiction because the controversy did not "arise under" federal law. R. Nos. 3, 4, 5, 8, 12, 19, 21-23. By Order dated July 18, 2000, the district court granted that motion. *See Penobscot Nation v. Georgia-Pacific Corp.*, 106 F. Supp.2d 81 (D. Me. 2000), set forth in the Appendix hereto ("App.") 26-38 (*"Penobscot I"*). It concluded that the Tribes' action did not "arise under" federal law, and that the Settlement Act's "internal tribal matters" prohibition provided the Tribes with only a federal defense to the Corporations' MAA enforcement action in the state court. *Id.* The Tribes immediately asked the district court

to reconsider. *See* R. No. 29. After further extensive briefing and oral argument, the district court denied reconsideration on September 26, 2000. *See Penobscot Nation v. Georgia-Pacific Corp.*, 116 F. Supp.2d 201 (D. Me. 2000), set forth at App. 16-25 (*"Penobscot II"*). The court noted the difficulty of the issues presented in its concluding paragraph:

> Finally, I point out that cases involving Indian tribes often fail to address the operation of the well-pleaded complaint rule. Thus, it would be useful to have a clear appellate ruling that it does or does not apply in cases where issues of Indian sovereignty are in dispute.

Id. at 24-25. The Tribes immediately appealed from the district court's decisions in *Penobscot I* and *Penobscot II*, and its related judgment, to the First Circuit on October 2, 2000, and successfully moved to expedite the appeal. *See* R. No. 39.

In the meantime, on September 19, 2000, the Maine Superior Court granted the Corporations' motion for "partial summary judgment," denied the Tribes' motion to dismiss, and ordered the Tribes to grant the Corporations access to their reservation records. R. No. 33. At the request of the Corporations, the state court later entered final judgment against the Tribes, and on November 13, 2000, the Tribes, faced with contempt sanctions (including incarceration of their leaders) if they did not comply with the MAA or appeal to the Maine Supreme Judicial Court (the "Maine SJC"), appealed the Superior Court's denial of their motion to dismiss. Pet. Add. 36. The next day, pursuing the fastest course to a state court judgment, the Corporations asked the Maine SJC to expedite the appeal,

based upon the same MAA speedy trial provision they had referenced in threatening the Superior Court with mandamus. Pet. Add. 37-39. Over the Tribes' objection, the Maine SJC granted that motion. Pet. Add. 40.

The Corporations endeavored to slow the First Circuit's disposition of the Tribes' appeal. Opposing the Tribes' motion to schedule oral argument, the Corporations represented that there was no need for expedition because "[i]f . . . the [Maine] Supreme Judicial Court decision is in favor of the Companies, the Companies will agree not to enforce that decision by seeking to review Tribal documents until this Court [the First Circuit] has had an opportunity to rule." *Appellee Companies' Memorandum in Opposition to Appellant Tribes' Motion to Schedule Oral Argument* 2-3, *Penobscot Nation v. Georgia-Pacific Corp.*, 1st Cir., Docket No. 00-2265 (filed 12/11/00).

On May 1, 2001, the Maine SJC concluded that the Corporations could proceed against the Tribes under the MAA. *See Great Northern Paper v. Penobscot Nation*, 770 A.2d 574 (Me. 2001). (This Court denied the Tribes' *Petition for Writ of Certiorari* to the Maine SJC on November 13, 2001.)

On June 20, 2001, the First Circuit issued its decision in the instant matter. *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317 (1st Cir. 2001), set forth at App. 1-15. The court said that the question of the district court's subject matter jurisdiction presented on appeal was "difficult" and "not settled" by this Court. App. 5, 11. However, it did not reach it. The Maine SJC's "intervening decision," the First Circuit said, rendered the Tribe's "present federal suit superfluous" under the following

rule: "[w]here pending state- and federal-court suits involve the same underlying dispute, *res judicata* principles usually give the race to the first court to decide the merits." App. 12, 15. Thus, the court concluded "(despite the urging of the district court that we clear up the matter)" that it was unnecessary for it to address the merits of the Tribes' appeal from the district court's decisions in *Penobscot I* and *Penobscot II* that the Tribes could not invoke the federal court's jurisdiction under the "well-pleaded complaint rule." App. 11-12. Nevertheless, it *affirmed* the district court's judgment, thereby allowing the district court's rulings on these difficult and unsettled questions of subject matter jurisdiction to stand as a future obstacle to the Tribes' access to federal court. *See* App. 15.

On July 3, 2001, Petitioners timely filed a *Petition for Rehearing and Rehearing En Banc* in the First Circuit, asking the court to vacate the district court's decisions in *Penobscot I* and *Penobscot II* because, under this Court's long-standing equitable rule of vacatur, "when a federal court of appeals decides that a case (through no fault of the appellant) is moot, and thereby refrains from reviewing the merits of a district court decision sought to be reviewed by the appellant, the court should leave the appellant with a 'clear path' to relitigate the merits of the unreviewed decision in the future." *Appellants' Petition for Rehearing and Rehearing En Banc* 1, *Penobscot Nation v. Georgia-Pacific Corp.*, 1st Cir., Docket No. 00-2265 (filed 7/3/01) ("*Petition for Rehearing*") (citing, *inter alia*, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994) and *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)). The Tribes further requested the First Circuit

to strike *dicta* in its decision on the unreviewed issue presented under the equitable spirit of this Court's vacatur rule. *Petition for Rehearing* 8-11. By order dated August 24, 2001, the First Circuit denied the Tribes' Petition for Rehearing. App. 41-42.

ARGUMENT

This Court's "equitable tradition of vacatur" is of long-standing duration. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. at 25; *United States v. Munsingwear, Inc.*, 340 U.S. at 39-40 n.2 (citing 32 cases). It is "the duty of" federal appellate courts to follow it. *United States Dept. of Treasury v. Galioto*, 477 U.S. 556, 560 (1986) (citation and quotations omitted). *Accord, e.g., Associated Gen. Cont. v. City of New Haven*, 41 F.3d 62, 67 (2d Cir. 1994); *Northwest Pipeline Corp. v. F.E.R.C.*, 863 F.2d 73, 79 (D.C. Cir. 1988). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (it is "the established practice in the federal system").

The rule has been stated time and again by this Court: "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp*, 513 U.S. at 25. *Accord Arizonans for Official English*, 520 U.S. at 71 ("vacatur is in order when mootness occurs through happenstance – circumstances not attributable to the parties"). And its overarching importance is exemplified by this Court's

common use of it in order "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41. *See U.S. Bancorp.*, 513 U.S. at 25 n.3 ("We stand by *Munsingwear*'s dictum that mootness by happenstance provides sufficient reason to vacate."); *Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam) ("In view of the impediment to dispositive adjudication, we direct the vacation of prior judgments in this case.").

Thus, the denial of a party's request for vacatur by a federal circuit court of appeals warrants review on a petition for writ of *certiorari* to this Court, given this Court's "supervisory power over the judgments of the lower federal courts." *Munsingwear*, 340 U.S. at 40 (citing 28 U.S.C. § 2106). *See also id.* at 39 n.2 (listing cases). Moreover, where, as here, the application of the rule is clear, the appropriate disposition is to grant the petition, summarily vacate the judgment below, and remand the case "with directions to vacate the District Court's judgment." *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979). That should occur in the instant case for the reasons set forth below. Even if application of the rule were not clear in this case, however, the writ should issue, given the fundamental importance of the rule in this Court's jurisprudence, the conflict between the First Circuit's rejection of the rule here and its application by other circuits, and the significance of the decisions left unreviewed.

I. The Court Should Grant the Writ Because the First Circuit Clearly Erred in Failing to Apply the Court's Longstanding Equitable Rule of Vacatur and Its Rejection of the Rule Conflicts with the Decisions of Other Circuits

A. Mootness Warranting the Application of the Rule is Present

The First Circuit declined to apply this Court's equitable rule of vacatur as requested by the Tribes in their *Petition for Rehearing* by stating (simply) that there was no basis for an assertion "that the controversy was 'moot.' " App. 41. It said, "the controversy continues, as far as we are aware, to be litigated in the state court." *Id.* This reasoning for a rejection of the application of the vacatur rule in the circumstances of this case is plainly erroneous and conflicts with the decisions of other circuits.

In declining to hear the Tribes' appeal, the First Circuit, in its panel decision, reasoned that the "intervening decision" of the Maine SJC rendered the Tribe's "present federal suit superfluous" because "*res judicata* principles" gave "the race to the first court to decide the merits." App. 12, 15. The "federal court [could] grant the Tribes no relief beyond what the state's highest court had ordered." *Id.* 11-12. In other words, under *res judicata* principles, the Maine SJC's intervening decision constituted an "impediment to dispositive litigation" of *the Tribes' federal case*; it made *their federal case* nonjusticiable or "moot." *See Anderson v. Green*, 513 U.S. at 560. It was for that reason that the panel decided not to issue an opinion on whether the district court erred in its decisions in *Penobscot I* and *Penobscot II*. App. 11-12.

The First Circuit wrongly suggested that the requisite "mootness" for the application of the vacatur rule was lacking in this situation. This Court has always recognized that "mootness has two aspects: when *the issues presented* are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980) (citation and quotations omitted) (emphasis added). It is the former type of mootness, resulting from the Maine SJC's "intervening decision," that operated to deprive the Tribes of their right to appellate review of *Penobscot I* and *Penobscot II*. This brand of mootness derives from the prohibition against the issuance of advisory opinions by the federal courts under Article III of the Constitution. *See Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). That was the basis for the First Circuit's decision not to address whether the district court erred in barring the Tribes' access to federal court under the "well-pleaded complaint rule." Since the Tribes' federal case, by virtue of the Maine SJC's decision, was no longer justiciable, the First Circuit refused to give an advisory opinion on the issue presented by the Tribes' appeal. *See* App. 15. "No answer [was] needed," the First Circuit said, "because . . . the federal court [could] grant the Tribes no relief beyond what the state court's highest court ha[d] decreed." App. 11-12.

The equitable rule of vacatur clearly applies to situations where *the issue presented on appeal* becomes "moot" by virtue of such an intervening event as this. Indeed, at the heart of the rule is a simple precept: "a party should not be concluded in subsequent litigation by a District

Court resolution *of issues* when appellate review of the judgment *incorporating that resolution*, otherwise available as of right, fails because of intervening mootness." *A.L. Mechiling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961) (discussing *United States v. Munsingwear, Inc.*, 340 U.S. 36) (emphasis added).

In fact, the "issue mootness" confronted by the Tribes in this case is very much like that faced by the United States in *Munsingwear*. In *Munsingwear*, the United States filed a two count complaint against Munsingwear, Inc. for monetary damages and injunctive relief for alleged price-fixing. *Munsingwear*, 340 U.S. at 37. The case was bifurcated by agreement of the parties, trial for the injunction proceeded first, and the district court held that there was no liability because Munsingwear's pricing practices complied with the applicable regulation. *See id.* The United States appealed from that decision, but while the case was pending on appeal, the product that was the subject of the price-fixing allegation was decontrolled, and Munsingwear successfully moved to dismiss the appeal, as moot, on that basis. *Id.* The United States did not move to vacate the district court's prior decision. *Id.* Munsingwear then successfully moved to dismiss the remaining claims for damages on the ground that the district court's prior, unreversed decision on the issue of price-fixing barred the United States from proceeding further under the doctrine of *res judicata*. *Id.* The Eighth Circuit affirmed, and this Court granted review. *Id.* Before this Court, "[t]he United States protested the unfairness of affording preclusive effect to a decision that it had tried to appeal but could not." *U.S. Bancorp*, 513 U.S. at 22 (examining *Munsingwear*). But this Court said "[i]f there

is hardship in this case, it was preventable" because the United States "did not avail itself of the remedy it had to preserve its rights." *Munsingwear*, 340 U.S. at 39-40. It should have filed a motion to vacate the judgment under the Court's vacatur rule to invoke "the duty of the appellate court" to vacate the district court's price-fixing decision because the case had become moot while on appeal. *See id.* at 40.

The United States, in *Munsingwear*, suffered the *res judicata* effects of a prior decision, thereby losing the ability to have *an issue* decided on appeal because it failed to ask the Eighth Circuit to vacate the district court's decision. Here the Tribes have been told that they cannot attain appellate review of *an issue* because the *res judicata* effect of a state court judgment renders their case in the district court "superfluous." Unlike the United States in *Munsingwear*, however, they *have* moved for vacatur so as not to suffer the future preclusive effect of the issue they sought to have reviewed on appeal. There is no legally significant difference between the "mootness" consequence faced by the United States in *Munsingwear* and that faced by the Tribes in this case. At stake is the right to have an issue decided on appeal, and that right cannot be lost by circumstances beyond the control of an appellant; *how* the issue presented on appeal becomes nonjusticiable (or "moot") is of no moment for the application of this Court's vacatur rule, so long as it occurs by circumstances outside the control of the appellant. *See Arizonans for Official English v. Arizona*, 520 U.S. at 71-72; *U.S. Bancorp*, 513 U.S. at 23, 25; *Anderson*, 513 U.S. at 560; *Burke v. Barnes*, 479 U.S. 361, 365 (1987).

The First Circuit's decision to reject the rule in this case not only departs from the solid teachings of this Court, but it also conflicts with the application of the rule in other circuits. Both the Eleventh and the Fourth Circuits, for instance, have applied the rule *where an issue on appeal* has been mooted by intervening state court decisions. In *Blue Cross & Blue Shield of Alabama v. Nielsen*, 142 F.3d 1375 (11th Cir. 1998), the appellants sought review by the Eleventh Circuit of the district court's summary judgment decision in favor of Blue Cross & Blue Shield of Alabama. An answer to a certified question concerning state law required the court to affirm the judgment in favor of Blue Cross & Blue Shield. However, the appellants had sought review of a separate preemption ruling by the district court in favor of the company. Applying this Court's vacatur rule, the Eleventh Circuit held that "it would be unfair to leave them exposed" to the district court's preemption ruling in the future "since resolution of the state law issues mooted their appeal of the preemption issue in this case." *Id.* at 1376. Writing for the Fourth Circuit in *Potomac Greens Associates v. City Council*, 6 F.3d 173 (4th Cir. 1993), Chief Judge Ervin followed the same course when an answer to a certified question by the Virginia Supreme Court was dispositive of the case and thereby rendered moot other unreviewed issues of federal law pending on appeal. *Id.* at 175. Likewise, the Ninth, Tenth and District of Columbia Circuits have held that intervening changes to state or local laws during the pendency of appeals in which the validity or lawful application of such laws are at issue render moot *the issues on appeal* and, as a result, require vacation of district court rulings sought to be reversed. *See National*

Black Police Ass'n v. District of Columbia, 108 F.3d 346, 354 (D.C. Cir. 1997); *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995); *Exxon v. Heinze*, 32 F.3d 1399, 1404-05 (9th Cir. 1994).

The First Circuit's disposition of this case constitutes a *de facto* denial of the Tribes' appeal due to intervening mootness caused by the *res judicata* effect it accorded to the Maine SJC's decision. Its rejection of this Court's vacatur rule is plain error and is in conflict with the decisions of other circuits. Thus, the writ should issue.

B. The Equitable Principle Justifying the Rule of Vacatur, The Loss of Appellate Review By the Vagaries of Circumstance, Is Present

There can be no doubt that the foundational principle of equity underlying this Court's vacatur rule is present in this case: the Tribes, through no fault of their own, by the happenstance of an intervening event (the winning of the "race" to judgment by the Corporations in the Maine SJC), have lost the right to appellate review of the federal jurisdictional rulings they sought to overturn in the First Circuit. In this situation, equity requires that the decisions and related judgment of the district court in *Penobscot I* and *Penobscot II* concerning the "well-pleaded complaint rule" be vacated. This is necessary, as a fundamental matter of fairness, "to clear the path for future relitigation of the issues between the parties"; to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear* at 40-41. *Accord U.S. Bancorp.*, 513 U.S. at 25.

Indeed, as a matter of equity, this Court makes no distinction between the necessity of applying the vacatur

rule in a situation where, as here, an appellant loses its opportunity for appellate review of a lower court's ruling by the vagaries of circumstance, and a situation where an appellant loses that opportunity because the adverse prevailing party in the lower court initiates action to moot the case while appeal is pending. *See Arizonans for Official English*, 520 U.S. at 71-72. *Accord Penguin Books U.S.A., Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991). In other words, the unfairness wrought upon an appellant deprived of appellate review by the unilateral action of an adversary is, under the law, treated the same as the unfairness attending the loss of a right to appellate review as a result of an intervening event beyond the control of the appellant. In both cases, vacatur of the unreviewed decision is the disposition "most consonant to justice." *U.S. Bancorp.*, 513 U.S. at 391 & n.3.

This case most certainly is not one in which the "party seeking relief from the judgment below caused the nonjusticiability [of its federal case] by voluntary action," a circumstance that could warrant departure from the Supreme Court's general rule. *See id.* at 25 (discussing voluntary settlement while case is pending appeal). On the contrary, there can be no doubt that the Tribes did everything they could to preserve and attain a federal court determination of their rights in the face of the Corporations' determined "race" to a MAA judgment against them in the state court. *See supra* at 10-11. If anything, it was concerted efforts of the Tribes' adversaries (including their move for state court contempt sanctions against the Tribes and their leaders) that drove the circumstances generating the Tribes' loss of appellate review in this case. *See id.*

Thus, the rule of vacatur clearly applies. This Court should, therefore, grant this Petition, summarily vacate the First Circuit's judgment, and, on remand, instruct the First Circuit to vacate *Penobscot I* and *Penobscot II*.

C. Other Equitable Considerations Warrant the Application of the Rule

1. The Importance of the Decisions Left Unreviewed

As a result of the First Circuit's failure to apply this Court's vacatur rule, the Petitioner Tribes now face two decisions of the United States District Court in *Penobscot I* and *Penobscot II* that bar their access to federal court. Pursuant to these decisions, that court has decided that it has no duty, under either 28 U.S.C. § 1362 or 28 U.S.C. § 1331, to take jurisdiction over a claim by the Tribes that they have a federally-protected right to be free from assertions of state authority over their "internal tribal matters" in the face of an escalating controversy in which affirmative steps have been taken to impose such authority on the Tribes.[3] Under these decisions, the Tribes are locked out of the federal court in the future; they are relegated to the state court for the resolution of controversies about the very scope of state authority over issues

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[3] As the First Circuit points out, under *Bell v. Hood*, 327 U.S. 678, 685 (1946) and its progeny, the Tribes need only show a *colorable* claim under federal law. App. 9. While the First Circuit did not address that issue, App. 15, the Tribes would no doubt satisfy that standard as have many tribes in similar situations in the past. *See, e.g., Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1240-41 (10th Cir. 2001) (citing cases). *See also* cases cited *infra* note 4.

of core sovereign powers. *See Penobscot Nation v. Fellencer*, 164 F.3d at 708-09 (the "internal tribal matters" provision "preserves" and determines "the scope of tribal sovereignty").

Yet *Penobscot I* and *Penobscot II* by no means rest on settled law. Both the First Circuit and the district court acknowledge the "difficulty" and unsettled nature of the issues decided in these cases, especially the application of the "well-pleaded complaint rule" to actions by Indian tribes invoking 28 U.S.C. § 1362. *See* App. 10-11, 17 n.1, 32-38. Moreover, since those issues concern the federal court's subject matter jurisdiction, they involve matters of public policy of the highest order – problems of a constitutional dimension. *See New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358-59 (1989) ("*NOPSI*"); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964).

In applying the rule of vacatur, this Court considers the importance and unsettled nature of the decisions left unreviewed. *See Arizonans for Official English*, 520 U.S. at 75 (considering federalism concerns). *See also National Black Police Ass'n v. District of Columbia*, 108 F.3d at 353-54 (granting vacatur "serves the public interest" when unreviewed decision involves constitutional questions). Indeed, the rule is grounded in equity's long-standing concern that the public interest be considered in affording relief. *See U.S. Bancorp*, 513 U.S. at 26 ("As always when federal courts contemplate equitable relief, our holding must also take account of the public interest."); *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945).

The fundamental importance and unsettled nature of the decisions left unreviewed in this case decisively tip the scales in favor of vacating *Penobscot I* and *Penobscot II*.

First, federal courts have a strict constitutional duty (under the Separation of Powers Clause) to exercise the jurisdiction conferred upon them by Congress, and (as a corollary) not to surrender that jurisdiction to a state court. *See NOPSI*, 491 U.S. at 358. "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court" to consider federal claims "can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be a war with the unqualified terms in which Congress pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts." *England*, 375 U.S. at 415. The federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *NOPSI*, 491 U.S. at 358 (quotations and citation omitted). Thus, "[w]here a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court *has a duty* to accept that jurisdiction." *Allen v. McCurry*, 449 U.S. 90, 101 n.17, (1980) (emphasis added). *Accord NOPSI*, 491 U.S. at 359.

Second, there is deeply rooted in this Court's jurisprudence an historic solicitude for tribal rights in the face of state authority, coupled with skepticism about the ability of state courts to adequately protect such rights. There is "a good deal of force," this Court has said, to the view that "[s]tate courts may be inhospitable to Indian

rights." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566-67 (1983). *Accord Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 678 (1974) ("[S]tate authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians."). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 313 n.11 (1997) ("the readiness of the state courts to vindicate the federal right[s of Indian tribes] has been less than perfect") (Souter, J., with Stevens, Ginsburg, and Breyer, JJ., dissenting). And, according to the Court, Congress designed the very jurisdictional statute that the Tribes invoked here, 28 U.S.C. § 1362, to give Indian tribes access to the federal courts for resolution of controversies concerning their rights of self-government *in preference to state court adjudication of such controversies*. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. at 559 n.10; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 468 n.7 (1976). In the Settlement Act, Congress made clear that section 1362 was available to Petitioners. *See* 25 U.S.C. § 1725(d)(1).

Given the disposition below, leaving *Penobscot I* and *Penobscot II* unreviewed, the Tribes are left without an appellate determination as to whether the district court had a constitutional duty to take jurisdiction over their claims, especially under the mandate of section 1362.[4]

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[4] District Court's application of the well-pleaded complaint rule in reference to 28 U.S.C. § 1362 in *Penobscot I* and *Penobscot II* is different to square with the decisions of other courts. *See, e.g., Sac and Fox v. Hanson*, 47 F.3d 1062 (10th Cir.), *cert. denied*, 516 U.S. 810 (1995); *Quinault Tribe v. Gallager*, 368 F.2d 648, 656 (9th Cir. 1966). And its general application of the well-pleaded

Public policy requires that the path be cleared for the Tribes to test these issues in the future.

2. The Lack of a Clear Path to Future Litigation as a Result of the First Circuit's *Dicta* on the Unreviewed Issues

While concluding, in its June 20, 2001 decision, that "no answer is needed" on whether the district court erred in its application of the "well-pleaded complaint rule," the First Circuit discussed the merits of those rulings in *dicta*. *See* App. 5-11. Some of the Court's language could be interpreted as approving the district court's decisions. *See id.* at 9.

The purpose of this Court's vacatur rule is to leave the party that loses the opportunity for appellate review a "clear path" to litigate the merits of the appealed, but unreviewed, rulings in the future. *See Munsingwear*, 340 U.S. at 40. The slate should be wiped clean; the unreviewed decisions should "spawn[ ]" no "legal consequences." *See id.* at 41. *Accord U.S. Bancorp Mortgage Co.*, 513 U.S. at 25.

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complaint rule, whether applied in the context of 28 U.S.C. § 1362 or 28 U.S.C. § 1331, is inconsistent with a variety of cases in which states have sought to enjoin tribal authority and vice versa. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1994); *Wisconsin v. Baker*, 698 F.2d 1323, 1326-27 (7th Cir. 1982).

The *dicta* of the federal courts of appeals cannot be said to be devoid of legal consequence. By offering *any* views on the merits of the district court's decisions that the Tribes should be barred from accessing the federal court under the "well-pleaded complaint rule," even if technically in the form of *dicta*, the First Circuit failed to leave a "clear path" to the Tribes for future litigation of that issue in keeping with the directives of this Court. *See Great Western Sugar Co. v. Nelson*, 442 U.S. at 94 (Court of Appeals' "desire to show approval for the reasoning of the District Court" does not "excuse its failure to follow the teaching of *Duke Power Co., supra.*"); *Munsingwear*, 340 U.S. at 41. Thus, in the exercise of its "supervisory power over the judgments of the lower federal courts" and in the spirit of the equitable rule of vacatur, *see Munsingwear*, 340 U.S. at 40, the Court should grant the writ, vacate the judgment below, and remand with instructions to vacate the district court's decisions in *Penobscot I* and *Penobscot II*. The *dicta* in the First Circuit's decision, setting forth its view of the undecided "well-pleaded complaint rule" problem, does not leave the Tribes with a "clear path" to future litigation; rather it clutters it and, therefore, fails to comport with the spirit and purpose of this Court's vacatur rule expressed in *Munsingwear* and confirmed in *U.S. Bancorp Mortgage Co.*[5]

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[5] As an example, in the closing paragraph of its discussion of the jurisdictional issues it ultimately finds unnecessary to decide, the First Circuit states:

CONCLUSION

For all of the above reasons, the Court should grant the writ of *certiorari*, summarily vacate the First Circuit's judgment, and remand this case to the First Circuit with instructions to vacate the district court's judgment and decisions in *Penobscot I* and *Penobscot II*. Should the Court be of the view, however, that summary disposition is inappropriate, it should grant the writ of *certiorari* and proceed in the ordinary course, given the First Circuit's departure from the foundational principles of this Court's

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> Because of . . . uncertainties, we are reluctant (despite the urging of the district court that we clear up the matter) to decide in advance of necessity whether a federal claim can be conjured out of a lawsuit by the Tribes asserting that the threatened actions violate the internal affairs limitation contained in Maine law and *purportedly* ratified by a federal statute.

App. 11 (emphasis added). The Court's use of the word "purportedly" in this sentence not only conflicts directly with the reality that Congress' ratification of the "internal tribal matters" provision was *essential* to its enactment and *required* under the Constitution, *see supra* note 1 and accompanying text, but also with a prior conclusion of a separate First Circuit panel in *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir.), *cert. denied*, 527 U.S. 1022 (1999), where the court said, "[b]ecause the phrase 'internal tribal matters' *was adopted* by the federal Settlement Act, the meaning of that phrase raises a question of federal law." *Fellencer*, 164 F.3d at 708 (citations omitted) (emphasis added).

vacatur rule, its conflict with the decisions of other circuits, and the significant equities at issue in this case.

Respectfully submitted,

KAIGHN SMITH, JR., ESQUIRE
Counsel of Record
GREGORY W. SAMPLE
DRUMMOND WOODSUM & MACMAHON
245 Commercial Street
Portland, Maine 04101
(207) 772-1941
Counsel for Petitioners

RIYAZ A. KANJI
KANJI & KATZEN, PLLC
201 South Main Street
Suite 1000
Ann Arbor, Michigan 48104
(734) 769-5400

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PENOBSCOT NATION,
et al., Appellants,

v.

GEORGIA-PACIFIC CORPORATION,
et al., Appellees.

State of Maine, Defendant,
Intervenor-Appellee,

No. 00-2265.

United States Court of Appeals,
First Circuit.

Heard Feb. 9, 2001.

Decided June 20, 2001.

Kaighn Smith, Jr. with whom Gregory W. Sample and Drummond Woodsum & MacMahon were on brief for appellants.

Catherine R. Connors with whom Matthew D. Manahan and Pierce Atwood were on brief for appellees.

William R. Stokes, Assistant Attorney General, with whom Andrew Ketterer, Attorney General, and Paul Stern, Deputy Attorney General, were on brief for defendant, intervenor-appellee.

Before BOUDIN, Chief Judge, STAHL, Senior Circuit Judge and LYNCH, Circuit Judge.

BOUDIN, Chief Judge.

The appellants in this case, the Penobscot Nation and the Passamaquoddy Tribe ("the Tribes"), occupy tribal lands in Maine. The corporate appellees – Georgia-Pacific Corp., Great Northern Paper, Inc., and Champion International Corp. ("the companies") – operate pulp and paper

mills that discharge waste water in rivers near or flowing through the Tribes' reservations. A dispute developed between the Tribes and the State of Maine as to the regulation of waste water discharge under the Clean Water Act, 33 U.S.C. §§ 1342(b), 1377 (1994).

Concerned that the Tribes would seek to regulate their activities, the companies requested that the Tribes turn over broad categories of documents bearing on such (potential) regulation, including efforts by the Tribes to secure authority to regulate and pertinent agreements between the Tribes and federal agencies. The companies' demand, made on May 10, 2000, was based on Maine's Freedom of Access Act ("the Maine Access Act"), Me.Rev.Stat. Ann. tit. 1 §§ 401-10 (West 1989 & Supp.2000). Under Maine law, the Tribes are regulated in certain respects as municipalities, and municipalities are covered by the Access Act.

The Tribes then brought the present lawsuit against the companies in federal district court to obtain injunctive and declaratory relief debarring the companies from obtaining the documents they sought. The substance of the Tribes' position was that a settlement between Maine and the Tribes, reflected in both Maine law and a federal statute, precluded state regulation of "internal tribal matters" and that applying the Maine Access Act as sought by the companies would impermissibly regulate the Tribes' internal affairs. This federal suit was filed on May 18, 2000.

On May 22, the day before they were served with the federal complaint, the companies brought suit against the Tribes in the Maine Superior Court. Invoking the Maine

Access Act, Me.Rev.Stat. tit. 1 § 409(1), the companies demanded that the Tribes produce the documents previously sought. In this state-court suit, the Tribes resisted the demand by asserting, *inter alia,* that the internal affairs limitation in the settlement meant that the Maine Access Act could not validly be applied to require the Tribes to produce the documents. The same question as to the breadth of the limitation was thus posed in both courts.

The federal district court acted first, ruling on July 18, 2000, that it lacked jurisdiction to entertain the Tribes' suit for declaratory and injunctive relief against the companies. *Penobscot Nation v. Ga.-Pac. Corp.,* 106 F.Supp.2d 81, 86 (D.Me.2000) (*"Penobscot I"*). The court assumed that the internal affairs limitation could comprise a federal-law defense if the companies sued the Tribes under the Maine Access Act; but it ruled that under the well-pleaded complaint rule, the anticipatory assertion of such a defense in a suit by the Tribes did not create a case "arising under" federal law for purposes of the general federal-question jurisdiction statute, 28 U.S.C. § 1331, nor under the parallel language of section 1362, the special Indian jurisdiction statute.[1] *Id.* at 83-84. The court

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[1] Section 1332 [sic] provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Section 1362, entitled "Indian tribes," states that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." *Id.* § 1362.

thereafter (on September 26, 2000) denied reconsideration. *Penobscot Nation v. Ga.-Pac. Corp.*, 116 F.Supp.2d 201, 205 (D.Me.2000) (*"Penobscot II"*).

Shortly before the denial of reconsideration, the Maine Superior Court ruled on the merits of the companies' suit against the Tribes to enforce the Maine Access Act. *Great N. Paper, Inc. v. Penobscot Indian Nation*, No. CV-00-329, slip op. at 9 (Me.Super.Ct. Sept. 19, 2000). The state court ruled that the demand for documents did not contravene the internal affairs limitation and ordered the Tribes to produce the documents immediately, save for conventionally privileged documents which needed only to be logged. The Tribes refused, were held in contempt, and appealed to the Maine Supreme Judicial Court. The Tribes also appealed to us from the district court's dismissal of their federal suit.

On May 1, 2001, while the present appeal was pending before us awaiting decision, the Supreme Judicial Court decided the state appeal. *Great N. Paper, Inc. v. Penobscot Nation*, 770 A.2d 574, 592 (Me.2001). It ruled that the internal affairs limitation did protect the Tribes from having to produce documents reflecting internal deliberations about the waste water issue, but not from turning over under the Maine Access Act any correspondence between the Tribes and federal agencies on that issue. *Id.* The court vacated the lower court's judgment and contempt ruling and remanded for production of the narrower category of materials.

Because the district court dismissed for want of federal jurisdiction based on rulings of law, our review is *de novo*. *Mills v. Maine*, 118 F.3d 37, 41 (1st Cir.1997). To sum

up our conclusion at the outset, we think that whether the Tribes' claims "arise under" federal law within the meaning of either section 1331 or section 1362 is a difficult question; but the answer is now irrelevant in this case because the Maine Supreme Judicial Court has decided the merits of the underlying dispute, and any further proceedings in the federal district court are controlled by *res judicata* doctrine and would be pointlessly duplicative.

Understanding the jurisdictional issue requires a short excursion. The Tribes in this case occupy a status, and are subject to a legal framework, that is atypical. The federal Maine Indian Claims Settlement Act ("the Settlement Act"), 25 U.S.C. §§ 1721-35 (1994), and the Maine Implementing Act, Me.Rev.Stat. Ann. tit. 30 §§ 6201-14 (West 1996 & Supp.2000), capped a settlement, reached in 1980, between the Tribes and the State of Maine involving disputes as to whether the Tribes should be recognized at all and as to their claimed ownership of large tracts of land in Maine. In the settlement, the Tribes gave up much of their land claims but got recognition, trust funds, title to designated reservations, and certain regulatory powers within those lands. *See* 25 U.S.C. §§ 1723-25; Me.Rev.Stat. Ann. tit. 30 §§ 6205-10.[2]

However, partly as a result of the Tribes' disputed status, the State of Maine, as part of the settlement, obtained legal authority over the Tribes exceeding the usual state authority over native American tribes. The

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[2] The story is recounted in detail elsewhere. *See Great N. Paper*, 770 A.2d at 581-85; H.R.Rep. No. 96-1353, at 11-20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, 3787-96.

Tribes were for most purposes "subject to all the laws of the State of Maine." 25 U.S.C. § 1721(b)(4); *accord id.* § 1725; Me.Rev.Stat. Ann. tit. 30 § 6204. The Tribes were also (with a few exceptions not relevant here) made subject to suit in state courts. 25 U.S.C. § 1725(a); Me.Rev.Stat. Ann. tit. 30 § 6206(2). And a central provision of the state statute codifying the settlement contains both a general rule and a key qualification:

> Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, . . . and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

Me.Rev.Stat. Ann. tit. 30 § 6206(1).

In the federal Settlement Act, Congress did not expressly include the provision just quoted; but the Settlement Act did state, as "a purpose" of the statute, Congress' intent "to ratify" the Maine Implementing Act "which defines" the relationship between the State of Maine and the Tribes. 25 U.S.C. § 1721(b)(3). This court has assumed, albeit without extensive discussion, that the internal affairs limitation on state authority in the Maine Implementing Act is also an overriding *federal* limitation

on Maine authority over the Tribes. *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir.1997); *see also* 25 U.S.C. § 1735. The companies do not dispute that premise in this case.

This background brings us to the jurisdictional issue decided by the district court. The Tribes, in bringing their federal suit, based their claim of jurisdiction on the premise that their suit "arises under" federal law within the meaning of sections 1331 and 1362. In the Tribes' view, the controlling federal issue in the lawsuit is whether the internal affairs limitation is violated by applying the Maine Access Act to require the Tribes to produce the documents sought. The district court assumed *arguendo* that the internal affairs limitation was a creature of federal as well as state law. *Penobscot I*, 106 F.Supp.2d at 83.

But, as the district court pointed out in its very able decision, *Penobscot I*, 106 F.Supp.2d at 82, it is not enough to satisfy traditional "arising under" jurisdiction under section 1331 that a case involve a federal issue. Although this would certainly satisfy Article III, the Supreme Court has read the identically-worded statutory grant more narrowly, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494-95, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), and has, for some time, required that it be apparent from the face of the plaintiff's complaint either that a cause of action arise under federal law, *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 259-60, 36 S.Ct. 585, 60 L.Ed. 987 (1916), or at least (in some cases) that a traditional state-law cause of action (*e.g.*, a tort or contract claim) present an important federal issue.

This latter exception, often associated with *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201-02, 41 S.Ct. 243, 65 L.Ed. 577 (1921),[3] might include a case in which a state-law contract claim rests on a federal regulatory requirement. *E.g., Price v. Pierce*, 823 F.2d 1114, 1120-21 (7th Cir.1987), *cert. denied*, 485 U.S. 960, 108 S.Ct. 1222, 99 L.Ed.2d 422 (1988). This circuit treats *Smith* as good law but as limited to cases where an important federal issue is a central element in the state claim. *Almond v. Capital Props., Inc.*, 212 F.3d 20, 23-24 & nn. 2-3 (1st Cir.2000). The Tribes in this case do not rely on *Smith*.

In all events, there remains an overriding requirement that the federal claim or issue appear on the face of "a well [*i.e.*, properly] pleaded complaint," so that federal jurisdiction is absent where the federal issue would arise only as a defense to a state cause of action. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153-54, 29 S.Ct. 42, 53 L.Ed. 126 (1908). As a settled corollary, the restriction cannot be avoided by having the beneficiary of the defense assert the defense preemptively in a claim for declaratory or injunctive relief.[4] This is just what the

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[3] Although the Supreme Court has cited *Smith* with approval, its present scope remains in some doubt. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808-10 & n. 5, 813-15 & n. 12, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986); *Franchise Tax Board v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

[4] *Franchise Tax Board*, 463 U.S. at 16, 103 S.Ct. 2841; *Pub. Serv. Comm'n v. Wycoff*, 344 U.S. 237, 248, 73 S.Ct. 236, 97 L.Ed. 291 (1952); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-74, 70 S.Ct. 876, 94 L.Ed. 1194 (1950); *Playboy Enters., Inc. v. Pub. Serv. Comm'n*, 906 F.2d 25, 29-31 (1st Cir.), *cert. denied sub nom. Rivera Cruz v. Playboy Enters., Inc.*, 498 U.S. 959, 111 S.Ct. 388, 112 L.Ed.2d 399 (1990).

district court said that the Tribes were attempting to do. *Penobscot I*, 106 F.Supp.2d at 82-83; *Penobscot II*, 116 F.Supp.2d at 203-04.

The district court's treatment of the issue under section 1331 is straightforward and, with one possible qualification as to nomenclature, arguably correct. The qualification is that under *Bell v. Hood*, 327 U.S. 678, 685, 66 S.Ct. 773, 90 L.Ed. 939 (1946), and its progeny, the Supreme Court has often said that a *colorable* claim of a federal cause of action will confer subject matter jurisdiction even though the claim itself may fail as a matter of law on further examination.[5] On this view, the Tribes' suit, *if* colorably federal, would be better viewed as dismissed for failure to state a federal claim after "jurisdiction" to decide that issue had been established. *See Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 359, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

But is this a case where there is a federal claim? Certainly nothing in the Settlement Act explicitly creates a federal right for the Tribes to sue to enforce what is at most an implicitly-adopted federal limitation on state power that could easily be asserted as a defense in a state proceeding. The creation of private causes of action by implication from federal statutes used to be a cottage industry in the Supreme Court, *e.g.*, *J.I. Case Co. v. Borak*,

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[5] *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *Jackson Transit Auth. v. Local Div'n 1285, Amalgamated Transit Union*, 457 U.S. 15, 21 n. 6, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

377 U.S. 426, 433-34, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964), but it is now less favored, *see Karahalios v. Nat'l Fed'n of Fed. Employees*, 489 U.S. 527, 536, 109 S.Ct. 1282, 103 L.Ed.2d 539 (1989); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-78, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979).

Especially in Indian cases, the Supreme Court has sometimes found federal rights present – or at least arguably present – out of a tradition of federal regulation in the area. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 270-79 (1982 ed.). At the same time, the Maine tribes are not treated like most other tribes but are subject to extensive state regulation agreed to by Congress. And both of the cases mainly relied upon by the Tribes for section 1331 jurisdiction in this case are distinguishable on their facts.[6]

A further complication exists. In this case the Tribes say that even if section 1331 does not support jurisdiction, section 1362 will do so. The "arising under" language in the two statutes is parallel; and the purpose of section 1362 was probably just to confer federal jurisdiction where it otherwise would exist over Indian cases

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[6] *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) (non-Indian plaintiff's claim that federal law bars Indian tribal court from enforcing a default judgment against it arguably arises under federal law to extent sufficient to establish jurisdiction); *Oneida Indian Nation*, 414 U.S. at 666-67, 94 S.Ct. 772 (Indian claims of right to land in New York based on federal treaties and statutes).

without regard to the amount-in-controversy requirement that governed section 1331 at the time (but has been since repealed). *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 784, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). Yet, the Supreme Court has not settled definitively the question whether section 1362 reaches any further, and if so, how far, beyond section 1331. *See Blatchford*, 501 U.S. at 784-85, 111 S.Ct. 2578; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472-75, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

Because of such uncertainties, we are reluctant (despite the urging of the district court that we clear up the matter) to decide in advance of necessity whether a federal claim can be conjured out of a lawsuit by the Tribes asserting that the threatened actions violate the internal affairs limitation contained in Maine law and purportedly ratified by a federal statute.[7] Perhaps there is not even a single answer to this question – it could conceivably turn on the circumstances. *See Penobscot I*, 106 F.Supp.2d at 83 n. 4. In all events, no answer is needed in this case because, either way, the federal court

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[7] The Tribes refer extensively to this Court's recent decision in *Penobscot Nation v. Fellencer*, 164 F.3d 706, 713 (1st Cir.), *cert. denied*, 527 U.S. 1022, 119 S.Ct. 2367, 144 L.Ed.2d 771 (1999). We held there that the Penobscot Nation's decision, as employer, to fire a non-Indian community health nurse was an "internal tribal matter" and enjoined a suit brought by the discharged employee in state court alleging discrimination under the Maine Human Rights Act, Me.Rev.Stat. Ann. tit. 5, § 4551 *et seq.* (West 1998). As the district judge noted in this case, *Penobscot II*, 116 F.Supp.2d at 204 & n. 5, the question of subject matter jurisdiction was not raised by the parties or the court in that case, so our decision did not resolve the jurisdictional issue.

can grant the Tribes no relief beyond what the state's highest court has decreed.

Where pending state and federal-court suits involve the same underlying dispute, *res judicata* principles usually give the race to the first court to decide the merits. A federal court is (in general) bound to give the same respect to a Maine judgment that would be given to it by Maine courts. 28 U.S.C. § 1738 (1994); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). This is true regardless whether the state-court decision involves federal or state law. *Cruz v. Melecio*, 204 F.3d 14, 18 (1st Cir.2000). Here, Maine courts would be bound to give *res judicata* effect to the May 1 decision of the Maine Supreme Judicial Court.

In Maine, as in most jurisdictions, the pertinent branch of *res judicata*, collateral estoppel (now often called issue preclusion), provides that issues actually litigated, decided, and necessary to a final judgment are binding in future litigation between the same parties. *Morton v. Schneider*, 612 A.2d 1285, 1286 (Me.1992); *see also Restatement (Second) of Judgments* § 27 (1982). None of the exceptions in Maine law even arguably apply in this case. *See Mut. Fire Ins. Co. v. Richardson*, 640 A.2d 205, 208-09 (1998). Thus, unless there is some overriding federal exception, the district court would be bound to follow the Supreme Judicial Court's resolution of the central issue, namely, how the internal affairs limitation applies to the requested documents.

The Tribes do invoke a supposed federal exception to *res judicata* for which several cases are cited. The gist of

the suggested exception is that matters involving "controversies about state power over Indian tribes" are so sensitive and so suffused with a federal interest that they deserve special treatment. In substance, the Tribes are urging that *res judicata* doctrine be ignored and that a federal court routinely reexamine the merits even in the teeth of a prior state-court determination. Most of the cases cited by the Tribes do not even remotely support such an exception.

The only case warranting discussion is the Tenth Circuit's decision in *Kiowa Indian Tribe v. Hoover,* 150 F.3d 1163 (10th Cir.1998). There, a judgment creditor with a state-court judgment against the Kiowa Tribe on promissory notes obtained state-court authority to garnish tribal revenues, and the Tribe brought an action in federal court under section 1983, 42 U.S.C. § 1983 (Supp. II 1996), to enjoin the garnishment. *Id.* at 1168. The district court dismissed the action under the *Rooker-Feldman* doctrine, something of a cousin to *res judicata. See D.C. Court of Appeals v. Feldman,* 460 U.S. 462, 476, 483-86 & n. 16, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fid. Trust Co.,* 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923). The appeals court reversed, holding that the state judgment did not resolve the matter.

Whether *Kiowa Tribe* was rightly decided or not, it is completely distinguishable. The Tenth Circuit viewed the ongoing state garnishment proceeding, under attack in the section 1983 action, as "separable from and collateral to" the state-court final judgment against the Kiowa Tribe. 150 F.3d at 1171. Here, no such separation exists: the Tribes' theory is that the internal affairs limitation affords complete protection for all the documents sought;

the final judgment of the Maine Supreme Judicial Court decided precisely this issue but held that some of the documents were protected and others were not, *see* 770 A.2d at 590. Certainly, nothing in *this* state decision is so implausible as to suggest the need for independent federal reexamination.

On the premise of *Akins*, 130 F.3d at 485, this is ultimately a federal issue, and if so, the Tribes may request *certiorari* in the United States Supreme Court, as they are apparently seeking to do. The Supreme Court is entitled to review a state-court decision that decides a federal issue even if the action is one that could not have been brought in a federal district court under statutory "arising under" jurisdiction. 28 U.S.C. § 1257 (1994). If the Supreme Court does take the case and decides it differently, then all the relief that the Tribes seek would be furnished on remand in the state system.

There is one loose end. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), a plurality of the Supreme Court disapproved the (until then) common practice by which lower federal courts sometimes bypass jurisdictional questions and resolve the merits where the result would be the same however the jurisdictional question were decided. *Id.* at 101-02, 118 S.Ct. 1003. It is not clear how firmly the *Steel Co.* plurality rule is endorsed by a majority of the Court, *see, e.g., id.* at 110-11, 118 S.Ct. 1003 (O'Connor, J., concurring, joined by Kennedy, J.); *id.* at 111-12, 118 S.Ct. 1003 (Breyer, J., concurring in part and concurring in the judgment), or how far *Steel Co.* applies when the "jurisdictional" objection is something less fundamental than a doubt as to Article III jurisdiction. *See*

United States v. Woods, 210 F.3d 70, 74 & n. 2 (1st Cir.2000); *Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 53-54 (1st Cir.1999).

However these questions may be answered, *Steel Co.* is no bar to our disposition. The *Steel Co.* limitation is fundamentally an objection to deciding "the merits" where jurisdiction is lacking. *See, e.g.*, 523 U.S. at 101, 118 S.Ct. 1003. Here, without reaching the merits, we simply conclude that the Maine judgment, binding under 28 U.S.C. § 1738, would prevent the district court from affording any different relief. *Steel Co.*'s underlying concern is not implicated. This spares us the need to explore further whether under *Bell v. Hood*, there is a sufficiently colorable federal claim to confer subject matter jurisdiction, an outcome that would also make *Steel Co.* inapplicable.

Accordingly, regardless whether the district court had jurisdiction or whether a federal cause of action is presented, the intervening decision of the Maine Supreme Judicial Court forecloses on *res judicata* grounds the broader relief sought by the Tribes and makes the present federal suit superfluous. On this ground, the judgment of the district court is *affirmed*. Abstention requests, urged by the State of Maine as intervenor, need not be considered.

It is so ordered.

PENOBSCOT NATION and Passamaquoddy Tribe, Plaintiffs,

v.

GEORGIA-PACIFIC CORPORATION, Great Northern Paper, Inc., and Champion International Corporation, Defendants,

and

State of Maine, Intervenor.

No. 00-101-B-H.

United States District Court,
D. Maine.

Sept. 26, 2000

Kaighn Smith, Jr., Melissa A. Hewey, Gregory W. Sample, Drummond, Woodsum & MacMahon, Portland, ME, for Penobscot Nation, plaintiff.

Catherine R. Connors, Matthew D. Manahan, Pierce, Atwood, Portland, ME, for Georgia-Pacific Corporation, defendant.

William R. Stokes, Assistant Attorney General, Augusta, ME, for Maine, State of, intervenor-defendant.

ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION

HORNBY, Chief Judge.

On July 18, 2000, I dismissed the plaintiff Tribes' claims for declaratory and injunctive relief on the basis that, as a result of the well-pleaded complaint rule, there was no federal subject matter jurisdiction under either the general federal question jurisdiction statute, 28 U.S.C.A. § 1331 (West 1993), or the Indian jurisdictional

statute, 28 U.S.C.A. § 1362 (West 1993). *See Penobscot Nation v. Georgia-Pacific Corp.*, 106 F.Supp.2d 81, 82 (D.Me.2000).

The Tribes have moved for reconsideration, arguing that federal jurisdiction exists under § 1362 regardless of the well-pleaded complaint rule because the United States could have brought the lawsuit as trustee for the Tribes before enactment of § 1362; and that I have misapplied the well-pleaded complaint rule as it applies to both § 1331 and § 1362 in treating the Tribes' federal issue as a defense. The motion is DENIED. The Tribes' argument about the trustee power is not supported by the caselaw.[1]

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[1] The Tribes argue that the Department of the Interior historically could have brought this lawsuit. As I said in my original Order, the only authorities that speak to this topic describe the historic trustee enforcement power as extending to actions involving land, personalty, and money, *see Penobscot Nation*, 106 F.Supp.2d at 85, none of which is involved here. The Tribes point out that other issues of sovereignty are implicated by the precedents, but they have not pointed me to any case where such issues were raised independently of trustee actions concerning land, personalty and money. Instead, "[t]he Tribes note that it is difficult to divorce the right of tribes to be free from state regulatory authority from tribal rights in land or personalty." Pls.' Mot. for Recons. of Order on Defs.' Motion to Dismiss and Vacate J. at 13 n. 7. In fairness, I agree that the question of section 1362's scope is difficult, given *Blatchford*'s and *Moe*'s cryptic utterances and lower courts' frequent failure to address the applicability of the well-pleaded complaint rule. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 783-85, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 472-75, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). But extending section 1362 to this unique dispute reads *Blatchford* and *Moe* more broadly than a lower court can.

As for the well-pleaded complaint rule, I conclude that my Order correctly and logically applied Supreme Court and circuit precedents that deal explicitly with that principle. *See Penobscot Nation*, 106 F.Supp.2d at 82-83. I recognize that the result in a recent First Circuit decision seems to be contrary to how I applied the well-pleaded complaint rule. But the well-pleaded complaint rule was never raised in that case by the parties or the courts at either the trial or the appellate level.

This dispute has arisen because the defendant paper companies are using Maine's Freedom of Access Law, 1 M.R.S.A. §§ 401-410 (West 1989 & Supp. 1999), to seek access to certain of the Tribes' records about water resources and quality. The plaintiff Tribes filed this lawsuit in federal court invoking federal law and seeking declaratory and injunctive relief to prevent the paper companies from pursuing the application of the state Freedom of Access Law in state court. I use the Tribes' own characterization of the dispute in the opening lines of their memorandum of law in opposition to the paper companies' motion to dismiss:

> This action arises out of [the paper companies'] attempt to impose the regulatory provisions of Maine's Freedom of Access Laws, 1 M.R.S.A. §§ 401 *et seq.* ("MFAL") upon the Penobscot Nation and the Passamaquoddy Tribe (the "Tribes"). When [the paper companies] sought to impose MFAL on the Tribes, the Tribes commenced this action on May 18, 2000 to protect their right to be free from state regulation pursuant to the Maine Indian Claims Act of 1980, 25 U.S.C. § 1721 *et seq.* (the "Settlement Act").

Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss or Stay at 1. Similarly, in their motion for reconsideration, the Tribes concede that "state law creates Defendants' cause of action under MFOAL," but argue that "[e]ven though" that is so, federal jurisdiction exists because the federal issue of tribal sovereignty will inevitably come up in the lawsuit. Pls.' Mot. for Recons. of Order on Defs.' Mot. to Dismiss and Vacate J. at 7. For the reasons I set forth in my Order of July 18, 2000, conventional application of the well-pleaded complaint rule treats the Tribes' federal issue as a defense to the paper companies' state law claim. *See Penobscot Nation*, 106 F.Supp.2d at 82-83. The result is that federal jurisdiction is missing.

To avoid the well-pleaded complaint rule, the Tribes argue that the paper companies' access effort itself depends on federal law and thereby provides federal jurisdiction. That is so, they say, because the state Implementing Act, 30 M.R.S.A. §§ 6201-6214 (West 1996), on which the paper companies rely to treat the Tribes as subject to certain municipal responsibilities like Maine's Freedom of Access Law, has an explicit exception or proviso: "provided, however, that internal tribal matters . . . shall not be subject to regulation by the State." 30 M.R.S.A. § 6206(1). The First Circuit has held that interpretation of this "tribal matters" exception raises a question of federal law. *See Penobscot Nation v. Fellencer*, 164 F.3d 706, 708 (1st Cir.), *cert. denied*, 527 U.S. 1022, 119 S.Ct. 2367, 144 L.Ed.2d 771 (1999); *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir.1997). The Tribes conclude, therefore, that the paper companies' claim against them will have to involve consideration of that federal issue

and, as a result, confers federal jurisdiction over the Tribes' declaratory judgment lawsuit.

Under well-pleaded complaint analysis, however, that is not enough. The paper companies are asserting that Maine's Freedom of Access Law (a state statute) compels the Tribes to open their records as if they were municipalities because of language in the Implementing Act (another state statute), making the Tribes "subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State." 30 M.R.S.A. § 6206(1). Now the other language in the Implementing Act that the Tribes point to (the "provided, however" language) well may be interpreted to give them a successful defense to the coverage the paper companies assert – a federal defense, according to *Fellencer* and *Akins*, because Congress ratified it. But under well-pleaded complaint analysis it still is a defense to the paper companies' claim that Maine's Freedom of Access Law applies to the Tribes.[2] Thus, it does not confer federal jurisdiction under the well-pleaded complaint rule; instead, it is the classic case where jurisdiction does not exist.

The Tribes argue that the paper companies cannot make the case that the state Freedom of Access Law applies, however, without using federal law, and therefore that jurisdiction exists even under the well-pleaded

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[2] It is the Tribes, not the paper companies, who wish to rely upon the language "internal tribal matters," and they are doing so to defend against the assertion that the Freedom of Access Law otherwise applies to them.

complaint rule. The argument goes as follows. The Freedom of Access Law, by its terms, applies to municipalities. It is the separate Implementing Act upon which the paper companies must rely to hold the Tribes to some of the responsibilities of municipalities. But the Implementing Act could not become effective without ratification by Congress.[3] Therefore, the paper companies' claim presents a federal claim under the well-pleaded complaint rule.

This argument fails because of Justice Cardozo's 1936 opinion in *Gully v. First National Bank*. Quoting in part from an earlier decision, he said:

> 'The federal nature of the right to be established is decisive – not the source of the authority to establish it.' Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. With no greater reason can it be said to arise thereunder because permitted thereby.

299 U.S. 109, 116, 57 S.Ct. 96, 81 L.Ed. 70 (1936) (citation omitted). The same conclusion applies here. The fact that

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[3] The Maine Legislature explicitly stated that the Implementing Act would not become effective without ratification, *see* Act to Implement Maine Indian Claims Settlement, 1979 Me.Laws 732, § 31, but that is less important to the Tribes' argument than the assertion that only Congress can permit this kind of regulation of Indian tribes in any event.

Congress ratified what Maine did and thereby permitted Maine to legislate concerning the Tribes – or that it prohibited Maine from doing so – does not suffice to let the Tribes meet the test for "arising under" federal jurisdiction.[4]

But as I have said, the outcome of one recent First Circuit decision is difficult to square with this analysis. In *Fellencer*, the First Circuit ruled that the Penobscot Nation was entitled to a federal court injunction against the state court lawsuit of a terminated female employee who was suing the Nation for state-prohibited sex discrimination. *See* 164 F.3d at 707. The Nation's federal "claim" was that federal law – specifically, the "internal tribal matters" exception that the Tribes also assert here – prevented Maine courts from applying the Maine Human Rights Act. Under well-pleaded complaint analysis, that "claim" sounds like a federal defense that the Nation could have asserted in state court – not enough to confer federal jurisdiction. Nevertheless, without mentioning the well-pleaded complaint rule, *Fellencer* assumed that jurisdiction existed. I have examined the trial court record from this District and discovered that the well-pleaded complaint rule was never briefed. The lawyer who represented the Penobscot Nation in that case is the lawyer for the Tribes in this case, and he informed me at oral argument that the well-pleaded complaint rule likewise was

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[4] Moreover, the Tribes would undoubtedly still raise their federal "internal tribal matters" defense even if Maine by separate, unratified legislation, imposed the MFOAL explicitly and directly upon them. At bottom, the Tribes dislike the well-pleaded complaint rule when issues affecting their sovereignty are at stake.

never mentioned on appeal. I do not therefore read *Fellencer* as having rejected the well-pleaded complaint rule for Indian cases.[5]

The Tribes argue that the consequence of this reasoning is to deprive them of the federal protection of their sovereignty – that it is an affront to that sovereignty to have to appear in state court to assert the defense and even worse if the state courts reject it. The premise of the well-pleaded complaint rule, however, is that federal issues can be handled perfectly well by state courts (indeed, there is no constitutional requirement that Congress establish inferior federal courts) and are to be addressed there when they are a defense rather than part

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[5] *Akins*, the case from which *Fellencer* drew the presumption that "internal tribal matters" raises a federal issue, found no subject matter jurisdiction for other reasons and did not address the well-pleaded complaint rule. In my earlier Order, I pointed to *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), as possibly being an anomaly under the well-pleaded complaint rule. *See Penobscot Nation*, 106 F.Supp.2d at 83 n. 3. In retrospect, I conclude that *National Farmers* and other cases challenging tribal court proceedings on the basis of federal law, *see, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (1st Cir. 2000), do not fit the well-pleaded complaint rule for an additional reason. There is no appellate review of a tribal court decision outside the tribal courts and therefore no way to address any federal issue even in the United States Supreme Court unless a federal action for declaratory/injunctive relief is permitted. Thus, the assumption of the well-pleaded complaint rule – that the federal issue will get attention from state courts that are bound to apply federal law by virtue of the Supremacy Clause, U.S. Const. art. VI, and that United States Supreme Court review is available if they fail to – does not apply.

of the federal claim. Not surprisingly, the State, an intervenor in this lawsuit, claims that it would be affronted if the opposite result were reached, because then every assertion of its jurisdiction under the Implementing Act would have to be raised in federal court, whereas part of the Indian Land Claims Settlement, it says, was to confirm state jurisdiction in enumerated areas. *See Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996) ("Among other things, the Settlement Act . . . submitted the Passamaquoddies, the Penobscots, and their tribal lands to the State's jurisdiction."). Neither of these arguments affects the outcome here. The well-pleaded complaint rule exists. It has been criticized by the commentators, *see* 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3566, at 85, 89-90 (2d ed.1984), but until it is overruled, I simply apply it.

I do emphasize what I said in my earlier Order: this decision in no way intimates that the Tribes do or do not have a serious federal defense to the application of Maine's Freedom of Access Law. This decision is solely about what forum shall hear that argument.[6]

Finally, I point out that cases involving Indian tribes often fail to address the operation of the well-pleaded

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[6] It has come to my attention that the Maine Superior Court has issued a decision and order finding that it has jurisdiction in this dispute, that the Tribes are subject to Maine's Freedom of Access Law, and that the paper companies' requests under the Freedom of Access Law do not implicate any internal tribal matter under the Implementing Act. *See Great N. Paper Co. v. Penobscot Nation*, No. CV-00-329, Me.Super.Ct., Sept. 19, 2000, at 3-9. That decision does not affect my analysis.

complaint rule. Thus, it would be useful to have a clear appellate ruling that it does or does not apply in cases where issues of Indian sovereignty are in dispute.

So Ordered.

PENOBSCOT NATION and Passamaquoddy Tribe, Plaintiffs,

v.

GEORGIA-PACIFIC CORPORATION, Great Northern Paper, Inc. and Champion International Corporation, Defendants.

and

State of Maine, Intervenor.

No. CIV.00-101-B-H.

United States District Court, D. Maine.

July 18, 2000.

Kaighn Smith, Jr., Melissa A. Hewey, Gregory W. Sample, Drummond, Woodsum & Macmahon, Portland, ME, for Penobscot Nation, Passamaquoddy Tribe, plaintiffs.

Catherine R. Connors, Matthew D. Manahan, Pierce, Atwood, Portland, ME, for Georgia-Pacific Corp., Great Northern Paper, Inc., Champion Intern. Corp., defendants.

William R. Stokes, Assistant Attorney General, Augusta, ME, for Maine, State of, intervenor-defendant.

ORDER ON DEFENDANTS' MOTION TO DISMISS

HORNBY, Chief Judge.

The plaintiff Indian tribes assert federal subject matter jurisdiction in this case on two bases: general federal

question jurisdiction, 28 U.S.C.A. § 1331 (West 1993), and the Indian jurisdictional statute added in 1966, 28 U.S.C.A. § 1362 (West 1993). I conclude that neither will support this federal lawsuit.

BACKGROUND

Three paper companies (the defendants) threatened to sue the Penobscot Nation and Passamaquoddy Tribe[1] in state court to compel them to turn over certain documents under the Maine Freedom of Access Act. After the Tribes received notice from the paper companies but before the paper companies could get to state court under the statutorily required waiting period, the Tribes filed this federal lawsuit against them seeking an injunction against any state court lawsuit and a declaratory judgment that the Maine Freedom of Access Act violates "their federal right to be free of such state regulation." Compl. ¶ 10. The Tribes rely in part upon the Maine Indian Claims Settlement Act of 1980, 25 U.S.C.A. § 1721 *et seq.* (West 1983 & Supp.2000). The paper companies have moved to dismiss for lack of federal subject matter jurisdiction.

ANALYSIS

A. Section 1331

The general federal question jurisdiction statute gives federal district courts original jurisdiction of "all civil actions arising under the Constitution, laws, or

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[1] The plaintiffs refer to themselves collectively as the Tribes and I shall do the same.

treaties of the United States." 28 U.S.C.A. § 1331. "Arising under" has been narrowly interpreted: when a plaintiff has a claim created by state law and a defendant has a federal defense, the Supreme Court has made clear that the lawsuit does not "arise under" federal law and that there is no general federal question jurisdiction. *See Franchise Tax Bd. of State of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-12, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). This has come to be known as the "well-pleaded complaint rule," "the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *see also American Nat. Red Cross v. S.G.*, 505 U.S. 247, 258, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992) ("The 'well-pleaded complaint' rule applies only to statutory 'arising under' cases. . . . ") (citations omitted). As a result, the plaintiff cannot file the case in federal court, *see, e.g., Iowa Management & Consultants, Inc. v. Sac & Fox Tribe*, 207 F.3d 488, 489 (8th Cir. 2000); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 681 (5th Cir. 1999), and the defendant cannot remove it to federal court, *see Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 840-41, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989) (per curiam).[2]

The answer is the same if the defendant acts first and brings a declaratory judgment action in federal court seeking a declaration that its federal defense trumps the

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[2] Except in instances where federal law preempts the field, *see Metropolitan Life*, 481 U.S. at 63-67, 107 S.Ct. 1542; *Oklahoma v. Wyandotte Tribe*, 919 F.2d 1449, 1450 (10th Cir. 1990), an argument not asserted in this case.

plaintiff's state law claim. Although the defendant has thereby become the plaintiff and ostensibly has pleaded a claim that is federal, there still is no federal jurisdiction. Specifically, in 1983 the United States Supreme Court announced that a 1950 decision (*Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194) "has come to stand for the proposition that 'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.' " *Franchise Tax Bd.*, 463 U.S. at 16, 103 S.Ct. 2841; *quoting* 10A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2767, at 744-45 (2d ed.1983). This statement made definitive what had been suggested in *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952):

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in

> the nature of a defense to a threatened cause of action.

344 U.S. at 248, 73 S.Ct. 236.[3]

Here, the Tribes claim that federal law prevents the application to them of Maine's Freedom of Access Act. Perhaps they are correct (I express no view) but, if so, that is a matter to present to the courts of the State of

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[3] There is confusing language in *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). There, the Supreme Court stated:

> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331. Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331.

471 U.S. at 852-53, 105 S.Ct. 2447 (footnote omitted). As phrased this federal issue sounds like a defense. But such a reading makes it inconsistent with the well-pleaded complaint rule, which the Supreme Court has otherwise endorsed. Alternatively, *National Farmers* can be read to say that a Tribe's assertion of power over an outsider must be premised upon federal law. This reading makes it parallel to *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (dealing with a land claim), and consistent with the well-pleaded complaint rule. *See Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1473-75 (9th Cir. 1989) (citing *Oneida* and *Farmers Union* in support of federal jurisdiction in a case that presented a "close" question whether the Village's claim to enforce its ordinance arose under federal law).

Maine in defending against the paper companies' threatened lawsuit seeking to enforce the state law. Under the well-pleaded complaint rule as it applies to section 1331, that potential defense to the paper companies' state lawsuit does not furnish a basis for federal court jurisdiction in this lawsuit. The Tribes could not remove the paper companies' lawsuit from state court on the basis of their federal defense, and they cannot accomplish the same goal by preemptively filing their federal defense here first.[4]

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[4] Here, the Tribes seek injunctive relief as well as a declaratory judgment, but the parties have not analyzed whether that makes a difference. According to the First Circuit, "when the injunctive relief sought in reality does no more than effectuate the declaratory judgment by preventing the application of state law, the *Wycoff* rule still applies." *Playboy Enter., Inc. v. Public Serv. Comm'n*, 906 F.2d 25, 30 n. 7 (1st Cir. 1990). If the Tribes were seeking to enjoin state officials, federal jurisdiction would exist, *see Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), but the better view is that where, as here, private parties are defendants, the analysis is the same as for the declaratory judgment cause of action. "[I]t ought to be held that there is no federal jurisdiction of an action for a private party that federal law has preempted a duty he would otherwise owe to another private party." 13B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3566, at 102 (2d ed.1984). The First Circuit has said that it does not understand the meaningfulness of this distinction, but follows it. 906 F.2d at 30. I note that the State of Maine moved to intervene as a defendant and on July 7, 2000, I granted the motion for lack of any opposition, but the Tribes have asserted no claims against state actors.

B. Section 1362

Section 1362 gives federal courts original jurisdiction of "all civil actions, brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1362. The "arises under" language is remarkably parallel to that of section 1331. Should the analysis of claims, defenses and declaratory judgments/injunctions, then, be any different than it is for section 1331? Although the precedents are less definitive for section 1362 and although the Supreme Court has recognized some difference between the two statutes, I conclude that in this case there is likewise no jurisdiction under section 1362.

This jurisdictional statute was adopted in 1966. *See* Pub.L. 89-635, 80 Stat. 880. At the time, section 1331 had a requirement that at least $10,000 be at stake. *See* Pub.L. 85-554, 72 Stat. 415. In the Second Circuit, Judge Friendly concluded that section 1362's "sole purpose" was to eliminate section 1331's jurisdictional amount for lawsuits properly brought by Indian tribes and that otherwise the jurisdictional issues were the same. *See Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 920 n. 4 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). Judge Lumbard dissented, arguing that section 1362 should be interpreted more broadly and that, unlike section 1331, it should not be limited by the well-pleaded complaint rule "at least until the Supreme Court has passed on the question." 464 F.2d at 924-25. The Ninth Circuit agreed with Judge Lumbard. *See Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir.

1973). The Friendly-Lumbard dispute went to the Supreme Court in 1974, but was not resolved. *See Oneida Indian Nation*, 414 U.S. at 682, n. 16, 94 S.Ct. 772. Accepting the premise of the well-pleaded complaint rule for purposes of both section 1331 and section 1362, the Supreme Court found that the underlying complaint in *Oneida* did in fact state a federal claim. 414 U.S. at 667, 682 n. 16, 94 S.Ct. 772. The Supreme Court declined, therefore, to reach the argument that section 1362, in addition to eliminating the jurisdictional amount, was "intended to expand the scope of 'arising under' jurisdiction in the District Courts, beyond what judicial interpretations of that language have allowed under § 1331. . . . " *Id.*

In 1991, however, the Supreme Court seemed to endorse Judge Friendly's narrow reading of section 1362. In *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991), the Court said:

> Considering the text of § 1362 in the context of its enactment, one might well conclude that its sole purpose was to eliminate any jurisdictional minimum for "arising under" claims brought by Indian tribes. Tribes already had access to federal courts for "arising under" claims under § 1331, where the amount in controversy was greater than $10,000; for all that appears from its text, § 1362 merely extends that jurisdiction to claims below that minimum. Such a reading, moreover, finds support in the very title of the Act that adopted § 1362: "To amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes." 80 Stat. 880.

501 U.S. at 784, 111 S.Ct. 2578.[5] But *Blatchford* also recognized that a previous decision, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), had found an undefined "something more" in section 1362. 501 U.S. at 784, 111 S.Ct. 2578.[6] According to *Blatchford*, *Moe* means that " 'at least in some respects' " – not "generally" – Indian tribes have broader access to

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[5] The author of *Blatchford* (Scalia, J.) does not rely on legislative history. But the legislative history seems to support *Blatchford*. The House Report accompanying section 1362 stated:

> In providing for original jurisdiction of all civil actions of this type, the bill has the effect of removing the $10,000 jurisdictional requirement which presently applies as to such actions by reason of the provisions of section 1331 of the same chapter of title 28. The district courts now have jurisdiction over cases presenting Federal questions brought by the tribes when the amount in dispute exceeds $10,000. Enactment of this bill would merely authorize the additional jurisdiction of the court over those cases where the tribes are not able to establish that the amount in controversy exceeds that amount.

H.R.Rep. No.2040, *reprinted in* 1966 U.S.C.C.A.N. 3145, 3146. Elsewhere the House Report recounts the testimony of a Department of Interior representative and concludes:

> This bill would therefore authorize the addition of only those cases . . . where the tribes have not been able to show that the amount in controversy exceeds $10,000, and the Government for some reason does not want to prosecute the case in behalf of the tribe.

Id. at 3147.

[6] *Moe* ruled that section 1362 allowed a tribe to sue in federal court for injunctive relief from state taxation, relief that a private entity could not obtain because of 28 U.S.C.A. § 1341. *See* 425 U.S. at 472-75, 96 S.Ct. 1634.

federal courts, the way the United States would have if it were suing as trustee for the tribes. *Id.* (quoting 425 U.S. at 473, 96 S.Ct. 1634).[7]

The question, then, is what that "something more" means in this context. The class of cases in which the United States might bring suit as trustee for Indian tribes seems to be narrow. Some treatise writers and courts perceive it as limited to suits to protect federally derived real property rights, *see, e.g.*, 13B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and*

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[7] In 1983, the Supreme Court had observed in a footnote:

> Section 1362 was passed in 1966 in order to give Indian tribes access to federal court on federal issues without regard to the $10,000 amount-in-controversy requirement then included in 28 U.S.C. § 1331, the general federal question jurisdictional statute. Congress contemplated that § 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring suit as trustee for the Indians, and its passage reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court.

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 561 n. 10, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983).

Procedure § 3579, at 263-64,[8] or perhaps related rights against taxation. Another treatise reads the trustee power more broadly, as extending to monetary relief and personalty, in addition to land. *See* Rennard Strickland, ed., *Felix S. Cohen's Handbook of Federal Indian Law* at 310 (1982 ed.). Although the Tribes in this case speak generally about the trust power, they make no argument that it makes their case fit the *Moe/Blatchford* exception. Certainly, the controversy in this case does not involve land, personalty or monetary recovery. In fact, most lower court references to section 1362 after *Blatchford* have proceeded to treat it as virtually identical to section 1331.[9] The Tenth Circuit has said:

> Although § 1362 clearly removed some jurisdictional impediments for Indian tribes, it did not eliminate the requirement that there be a statutory or constitutional underpinning for the

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[8] *See also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 657 n. 1, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979) ("[T]he United States is entitled to go into court as trustee to enforce Indian land rights.") (construing *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912)). In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the First Circuit stated: "We emphasize what is obvious, that the 'trust relationship' we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act." *Id.* at 379.

[9] *See* John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L.Rev. 855, 932-33 and n.338 (1998), for a summary of the pre-*Blatchford* caselaw on the well-pleaded complaint rule as it applies to section 1362.

> cause of action. *See Gila River [Indian Community v. Henningson, Durham & Richardson],* 626 F.2d [708, 714 (9th Cir. 1980)] ("Congress used 'arising under' language in section 1362 that is identical to that contained in section 1331."); *see also Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 682 n. 16, 94 S.Ct. 772, 784 n. 16, 39 L.Ed.2d 73 (1974) (declining to find § 1362 broader than § 1331). For the same reasons that plaintiffs cannot bring this action under § 1331, they also cannot assert jurisdiction under § 1362.

Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1058-9 (10th Cir. 1993) (internal citation omitted)[10]; *accord Sac & Fox Nation v. Cuomo,* 193 F.3d 1162, 1166 n. 3 (10th Cir. 1999) ("Congress enacted § 1362 before it had amended § 1331 to eliminate the amount-in-controversy requirement. Its purpose was to exempt Indian tribes from that requirement, and it is well established that invoking § 1362 does not change a plaintiff tribe's duty to show that its complaint raises a substantial federal question.") (citing 1 F.3d 1052); *TTEA,* 181 F.3d at 682 ("28 U.S.C. § 1362[ ] adds nothing to our immediate question. . . . The 'arising under' language is the same as that

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[10] Before *Blatchford,* the Tenth Circuit seems to have taken a broader view of section 1362. *See United Keetoowah Band of Cherokee Indians v. Oklahoma,* 927 F.2d 1170, 1173 (10th Cir. 1991) ("[A]n action such as this by a tribe asserting its immunity from the enforcement of state laws is a controversy within § 1362 jurisdiction as a matter arising under the Constitution, treaties or laws of the United States") (citations omitted).

found in 28 U.S.C. § 1331, the general grant of federal question jurisdiction.").[11]

In sum, the "arising under" language of the two jurisdictional statutes is in all material respects comparable; the modern caselaw reads them as largely equivalent; and even the "something more" of *Moe* and *Blatchford* seems to be limited to suits the United States might have brought as trustee, whereas the Penobscot Nation and Passamaquoddy Tribe have not argued that this lawsuit could have been brought by the United States under its trustee powers. I conclude that the well-pleaded complaint rule analysis of section 1331 applies equally to the assertion of jurisdiction here under section 1362, and that there is no federal jurisdiction in this case.

The defendants' motion to dismiss is **GRANTED**.

SO ORDERED.

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[11] There may also be cases that have simply missed the issue. *See, e.g., Forest County Potawatomi Community v. Doyle*, 803 F.Supp. 1526, 1532-33 (W.D.Wis.1992) (apparently treating the federal "defense" as ground for a declaratory judgment and preliminary injunction action even under the well-pleaded complaint rule with no reference to *Franchise Tax Board, Skelly Oil* and *Wycoff*), *appeal dismissed as moot*, 7 F.3d 238 (7th Cir. 1993) (unpublished). Alternatively, as a gambling case this case might be distinguished on the basis of complete preemption. *See* n.2 *supra*.

United States Court of Appeals
For the First Circuit

No. 00-2265

PENOBSCOT NATION, ET AL.,

Appellants,

v.

GEORGIA-PACIFIC CORPORATION, ET AL.,

Appellees.

STATE OF MAINE,

Defendant, Intervenor-Appellee,

Before

Boudin, *Circuit Judge*,

Torruella, Selya, Stahl, Lynch and Lipez, *Circuit Judges*.

ORDER OF COURT

Entered: August 24, 2001

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be denied.

By the Court:

/s/ Janice M. O'Neil
Acting Clerk

[All Counsel of Record.]

United States Court of Appeals
For the First Circuit

No. 00-2265

PENOBSCOT NATION, ET AL.,

Appellants,

v.

GEORGIA-PACIFIC CORPORATION, ET AL.,

Appellees.

STATE OF MAINE,

Defendant, Intervenor-Appellee,

Before

Boudin, *Circuit Judge*,
Stahl, *Senior Circuit Judge*,
and Lynch, *Circuit Judge*.

ORDER OF COURT

Entered: August 24, 2001

The petition for rehearing is denied. The court's decision did not determine that the controversy was "moot" nor is there any basis for such a claim: on the contrary, the controversy continues, so far as we are aware, to be litigated in state court. The district court's judgement was affirmed not because the controversy was moot, but because any relief that the district court could afford

would be governed under *res judicata* doctrine by the prior determination of the state court which is itself competent to provide such relief.

By the Court:

/s/ Janice M. O'Neil
Acting Clerk

[All Counsel of Record.]

Supreme Court, U.S.
FILED
DEC 27 2001

(2)

No. 01-723

In The

Supreme Court of the United States

PENOBSCOT NATION; PASSAMAQUODDY TRIBE; BARRY L. DANA, in his capacity as Chief of the Penobscot Nation; RICHARD M. DOYLE, in his capacity as Governor of the Passamaquoddy Tribe; and RICHARD STEVENS, in his capacity as Governor of the Passamaquoddy Tribe,

Petitioners,

v.

GEORGIA-PACIFIC CORPORATION; GREAT NORTHERN PAPER, INC.; INTERNATIONAL PAPER COMPANY; and the STATE OF MAINE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS GEORGIA-PACIFIC CORPORATION'S AND GREAT NORTHERN PAPER, INC.'S BRIEF IN OPPOSITION

CATHERINE R. CONNORS
Counsel of Record
MATTHEW D. MANAHAN
BRIAN M. RAYBACK
PIERCE ATWOOD
One Monument Square
Portland, Maine 04101-1110
(207) 791-1100
Counsel for Respondents Georgia-Pacific Corporation and Great Northern Paper, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the First Circuit required to vacate the United States District Court for the District of Maine's decision that it lacked subject matter jurisdiction under the well-pleaded complaint rule when the First Circuit affirmed the District Court's ruling on the alternate grounds of *res judicata*, thereby depriving the original decision of issue preclusive or binding precedential effect?

2. In addressing Petitioners' motion for rehearing and rehearing en banc, was the United States Court of Appeals for the First Circuit required to expunge language from its decision discussing jurisdictional issues before entering judgment based on *res judicata* principles?

CORPORATE DISCLOSURE STATEMENT

1. Respondent Great Northern Paper, Inc. is a wholly-owned subsidiary of Inexcon Maine LLC. There are no publicly held companies that own 10% or more of the party's stock.

2. Respondent Georgia-Pacific Corporation has no parent companies, and there are no publicly held companies that own 10% or more of its stock.

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STATEMENT OF THE CASE

This is the second petition for certiorari that Petitioners (hereinafter "the Tribes") have filed this year, both arising out of their refusal to comply with Maine's Freedom of Access Act ("FOAA"), Me. Rev. Stat. Ann. tit. 1, §§ 401-410 (West 1989 & Supp. 2001).

In the first petition, the Tribes sought review of the Maine Supreme Judicial Court ("SJC")'s decision on the merits, in which the SJC held that the Tribes had to comply with some, but not all, of the FOAA requests served upon them by the Respondents (hereinafter "the Companies"). *See Great Northern Paper, Inc. v. Penobscot Nation*, 2001 ME 68, 770 A.2d 574, *cert. denied*, 70 U.S.L.W. 3338 (U.S. Nov. 13, 2001).[1]

In the instant petition, the Tribes challenge the decision of the United States Court of Appeals for the First Circuit rejecting the Tribes' effort to collaterally attack the SJC's decision. While the exact scope of the relief sought is not clear, it appears that the Tribes are not challenging the First Circuit's holding that the Tribes' parallel attempt to litigate the FOAA issues in federal court failed on *res judicata* grounds. Rather, it appears that the Tribes want this Court to order the First Circuit to (1) vacate the decision of the District of Maine, which the First Circuit affirmed on the alternate *res judicata* ground; and (2) expunge from the First Circuit's decision some portion of

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[1] There were originally three companies involved in this dispute. International Paper Company, the successor in interest to Champion International Corporation and one of the parties below, is not participating in this Brief.

the discussion of the well-pleaded complaint rule, upon which the District Court's initial decision was based.

In sum, having chosen to file this federal suit and forced the Companies to litigate it through a rehearing en banc motion in the First Circuit, the Tribes are now asking this Court to expunge the record as if their suit were never filed in the first place.

The Tribes argue that, when a federal court of appeals decides a case based on an alternate ground from that relied upon by the district court, equity compels the appellate court to (1) vacate the district court's decision; and (2) include no language in its own opinion discussing the ground upon which the district court relied. Aside from the fact that no legal authority exists for such a novel and extraordinary request, the Tribes have no equitable basis to seek such relief, however broadly the term equity is construed. While the Tribes allude opaquely to some sort of prejudice in letting the record stand as is, when a district court decision is affirmed on alternate grounds, the original ground upon which that decision was made is not binding upon any court. Similarly, the First Circuit's discussion of that original ground does not bind that Court of Appeals, nor any other court, to any particular determination on that issue in the future. Hence, the Tribes' Petition is devoid of any legal or logical support.

I. THE STATUS OF THE TRIBES UNDER THE SETTLEMENT ACTS

Rather than repeat a lengthy narrative of this dispute, the Companies provide only a summary of the

essential facts here. A more detailed factual background is found in the Companies' Statement of the Case from its Brief in Opposition to Petitioners' first petition. A copy of that Statement is included in the Appendix hereto. (*See* Respondents' Appendix, hereinafter "Resp. App.," at App. 1.)

Briefly, the Tribes' status as Indian tribes is "atypical." (Petitioners' Appendix, hereinafter "Pet. App.," at 5.) This unique status flows from two legislative enactments, one state and one federal (collectively "the Settlement Acts"): (1) the Maine Act to Implement the Indian Claims Settlement, Me. Rev. Stat. Ann. tit. 30, §§ 6201-6214 (West 1996 & Supp. 2001) ("MIA"); and (2) Congress's ratification of MIA in the Maine Indian Claims Settlement Act of 1980, 25 U.S.C.A. §§ 1721-1735 (West 2001) ("MICSA").[2] *See Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me.), *appeal dismissed for want of a substantial federal question*, 464 U.S. 963 (1983) (stating the Settlement Acts "set up a relationship between the tribes, the State, and the Federal government different from the relationship of Indians in other States to the State and Federal government").

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[2] While not relevant to the issues raised by the Tribes in their Petition, the Tribes' characterization of the Settlement Acts as a "modern-day, tripartite treaty" (Pet. for Cert. at 5 n.1) is incorrect. Because the Nonintercourse Act does not apply to the Tribes, 25 U.S.C.A. § 1724(g) (West 2001), the MICSA is not a treaty, but a statute passed by both houses of Congress and signed by the President. *See* H.R. Rep. No. 96-1353 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786. In contrast, a treaty is negotiated by the President and ratified by two-thirds of the Senate. *Compare* U.S. Const. art. I, § 7 (statutes) *with* U.S. Const. art. II, § 2 (treaties).

As a result of this legislation, the rule in Maine is that each Indian tribe "in certain capacities functions as a municipality of Maine and is reachable under State and Federal law in that capacity, but when it functions as a tribe as to internal tribal matters, it is not." *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997).

II. THE FACTORS PROMPTING THE COMPANIES' FOAA REQUESTS

The Companies discharge wastewater into rivers in Maine under federal and state discharge licenses. *Great Northern Paper*, 2001 ME 68, ¶ 3, 770 A.2d at 577. Pursuant to the National Pollutant Discharge Elimination System ("NPDES") program of the Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 2001), the State of Maine has applied to the U.S. Environmental Protection Agency ("EPA") to obtain primary authority to issue all NPDES permits in Maine. *Great Northern Paper*, 2001 ME 68, ¶ 4, 770 A.2d at 577-78.[3]

The Companies support full NPDES delegation to the State of Maine because it would simplify their licensing processing, reducing costs. The Tribes oppose the delegation, and, in response to the State's application, asked the EPA to conclude that the State lacks authority to regulate the water resources within their reservations because, according to the Tribes, they are entitled to be treated

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[3] On January 12, 2001, the State's application was granted for all parts of the State, except disputed Indian country, where the EPA has yet to make a final decision. 66 Fed. Reg. 12,791 (Feb. 28, 2001).

under the Clean Water Act as a separate "state." *Id.* This Tribal assertion of "state" status, impervious to state regulatory oversight of environmental issues, conflicts with the plain language of the Settlement Acts. *See, e.g.*, Me. Rev. Stat. Ann. tit. 30, § 6204 ("Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them . . . shall be subject to the laws of the State . . . .").

On March 9, 2000, counsel for the Companies discovered the existence of agreements between the Tribes and the EPA providing, among other things, that the EPA will make its best efforts to protect from disclosure all communications between the Tribes, the EPA, and other federal agencies, if requested under the federal Freedom of Information Act, 5 U.S.C.A. § 552 (West 1996 & Supp. 2001). (*See* Record Item No. 14 before the Maine Supreme Judicial Court, in *Great Northern Paper, Inc. v. Penobscot Nation*, Docket No. CUM-00-573, at ¶¶ 4, 6.)

Concerned about the content of these communications and their potential conflict with the Settlement Acts, the Companies served FOAA requests on the Tribes, seeking documents relating to the Tribes' efforts to gain regulatory powers over water resources within or adjacent to their borders. *Great Northern Paper*, 2001 ME 68, ¶¶ 5-6, 770 A.2d at 578.

III. THE RESULTING STATE AND FEDERAL LITIGATION

On May 10, 2000, the Tribes rejected the Companies' FOAA requests, arguing that FOAA did not apply to

them. *Id.* at ¶ 7, 770 A.2d at 578. Under FOAA, the Companies had to wait five working days before they could pursue their FOAA rights by filing an action in Maine Superior Court. Me. Rev. Stat. Ann. tit. 1, § 409(1). Before the Companies could file that action, the Tribes filed the instant suit in federal court, seeking an injunction against the state court action and a declaratory judgment that they do not have to comply with FOAA. (Pet. App. at 26.) After the statutory waiting period, the Companies promptly filed their state court action. *Great Northern Paper, Inc. v. Penobscot Nation*, CV-00-329, at 2 (Me. Super. Ct., Cumb. Cty., Sept. 19, 2000) (Crowley, J.). Hence, two actions, the Companies' state FOAA action and the Tribes' federal declaratory judgment action, were launched.

In the federal action, with the state Superior Court action pending, the Companies filed a motion to dismiss, asserting various jurisdictional defenses, including the well-pleaded complaint rule, which provides that federal jurisdiction cannot be based on a defense to a state law claim. The federal District Court (Hornby, C.J.) agreed that the well-pleaded complaint rule applied, and dismissed the Tribes' action on that basis. (Pet. App. at 38.) The Tribes filed a motion for reconsideration. (*Id.* at 17.)

While that reconsideration motion was pending, the state FOAA action proceeded to final judgment, with the Superior Court granting the Companies' motion for summary judgment. *Great Northern Paper*, 2001 ME 68, ¶¶ 8-10, 770 A.2d at 579. Back in the federal court, the Companies alerted the District Court to the final judgment; in rejecting the motion to reconsider, the District

Court chose again to rely on the well-pleaded complaint rule jurisdictional ground. (Pet. App. 18 & 24 n.6.)

Back in the state court, the Tribes appealed the Superior Court decision. The SJC affirmed in part and vacated in part on May 1, 2001. *Great Northern Paper*, 2001 ME 68, ¶ 64, 770 A.2d at 592.

The Tribes also appealed Judge Hornby's decision to the First Circuit Court of Appeals. Both the well-pleaded complaint rule and *res judicata* issues (among others) were briefed and argued. (*See* PACER docket entry for 12/20/00, Br. of Appellees in *Penobscot Nation v. Georgia-Pac. Corp.*, Civ. No. 00-2265 (1st Cir.) at 8-21; *see also* PACER docket entry for 12/28/00, Reply Br. of Appellants in *Penobscot Nation v. Georgia-Pac. Corp.*, Civ. No. 00-2265 (1st Cir.) at 13-25.) The First Circuit affirmed dismissal, choosing to base its decision on the *res judicata* ground. (Pet. App. at 4-5.) The First Circuit denied the Tribes' request for rehearing and for rehearing en banc on August 24, 2001. (*Id.* at 39-41.)

REASONS FOR DENYING THE WRIT

The Tribes claim that under the rule of vacatur, they cannot be "forced to live under the cloud of the [D]istrict [C]ourt's unreviewed decisions," and that the First Circuit's refusal to expunge its discussion of the well-pleaded complaint rule somehow conflicts with the decisions of other circuits or is otherwise so far beyond the usual course of judicial proceedings as to require an exercise of this Court's supervisory powers. (*See* Pet. for Cert. at 3.) The Tribes do not specify whether they fear

future preclusive or precedential effects of these courts' decisions, or both, or precisely what language in the First Circuit's decision that they wish to erase.

The Tribes do not cite a single case that supports their novel propositions that (1) a district court decision affirmed on alternate grounds must always be vacated; and (2) a decision rejecting a claim on *res judicata* grounds must be stripped of any language discussing any other potential ground for dismissal, including jurisdiction. This lack of support is not surprising, because, as a matter of law, the District Court's decisions and First Circuit's discussion of the well-pleaded complaint rule have neither issue preclusive nor binding precedential effect. Hence, vacatur would serve no equitable purpose. There is no conflict between the First Circuit's decision denying the Tribes' petition to vacate and the decisions of other circuits, let alone a departure from the accepted course of judicial proceedings that would justify exercise of this Court's supervisory powers. Sup. Ct. R. 10(a). Therefore, the writ should be denied.

I. THERE IS NO BASIS TO VACATE THE DISTRICT COURT'S DECISION ON EQUITABLE GROUNDS

The Tribes state that they seek vacatur to avoid the potential future impact of the District Court's decision that the well-pleaded complaint rule barred jurisdiction in this case. Their argument proceeds from an incorrect premise, and, therefore, they misapprehend the application of the vacatur doctrine to this case.

Vacatur is an equitable doctrine providing that a party should not suffer the negative effects of a district

court judgment when it is denied the benefit of appellate review through happenstance. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

Here, the Tribes were not denied the benefit of appellate review. A portfolio of reasons to dismiss the Tribes' federal action was presented to the District Court and the First Circuit. The District Court chose to base its decision on reason #1 (the well-pleaded complaint rule). The First Circuit chose reason #2 (*res judicata*). At the time the appeal was briefed and argued, the First Circuit was fully cognizant of all the relevant facts. It analyzed all the arguments, including both the well-pleaded complaint rule and *res judicata*, and contoured its opinion in light of all then and now existing circumstances and all the arguments fully and fairly presented to it.

For the reasons that the First Circuit articulated in its decision, it chose to rest its holding upon the *res judicata* ground. It does not follow from this choice, however, that its analysis, or the District Court's analysis, of the well-pleaded complaint rule should be stricken from the annals as if the well-pleaded complaint rule had never been raised at all. On the contrary, as both the District Court and the First Circuit's decisions noted, the issue is a complex one that can only benefit from reasoned analysis by jurists such as Chief Judge Hornby and Chief Judge Boudin.

Here, moreover, their analyses have only persuasive, not binding, impact upon the Tribes. Because of its equitable nature, the vacatur doctrine logically applies only when the party invoking the doctrine might be subject to some unfair consequence absent vacatur. Here, not only

would any consequence not be unfair (for the reasons noted above), but there is no concrete consequence in the first place.

The Tribes' flawed premise is, apparently, that the District Court's conclusion that it lacked subject matter jurisdiction due to the well-pleaded complaint rule somehow binds that or other courts. (*See* Pet. for Cert. at 3: "Those decisions . . . stand against the Tribes for the future.") But it is well established that there is no issue preclusive effect to the original decision when an appellate court affirms on alternate grounds, as it did here. Restatement (Second) of Judgments § 27 cmt. o (1982); *see also Audette v. Sullivan*, 19 F.3d 254, 257 (6th Cir. 1994) (holding there is no preclusive effect to district court's decision when affirmed on different grounds); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986) (holding "if an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground").

Because the First Circuit follows the rule in Section 27 of the Restatement (Second) of Judgments, neither of the District Court's decisions on the application of the well-pleaded complaint rule has preclusive effect. *Hoult v. Hoult*, 157 F.3d 29, 31 (1st Cir. 1998). Petitioners fail to cite any authority contrary to this basic point, and therefore cannot show that the First Circuit's decision in any way conflicts with the decisions of other circuits, or is

somehow beyond the usual course of proceedings, as required by Rule 10(a) of this Court.[4]

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[4] The only two decisions cited by the Tribes (Pet. for Cert. at 20) of even potential relevance only underscore the differences between the instant situation and those where vacatur might arguably be appropriate within the discretion of the Court of Appeals. *See Blue Cross & Blue Shield v. Nielsen*, 142 F.3d 1375 (11th Cir. 1998) (per curiam); *Potomac Greens Assocs. P'ship v. City Council*, 6 F.3d 173 (4th Cir. 1993).

In *Blue Cross*, the question was whether the Alabama Provider Act applied to Blue Cross. The District Court said no. It additionally concluded that even if the Act did apply, it would be preempted by ERISA. The Eleventh Circuit Court of Appeals certified the application question to the Alabama Supreme Court, which declared that the Act did not apply. The Court of Appeals then accepted the Supreme Court's conclusion and vacated the District Court's decision on the preemption issue. *See Blue Cross*, 142 F.2d at 1376.

In *Potomac Greens*, the plaintiffs challenged a local zoning ordinance. The District Court agreed with two of their arguments: (1) the defendant had violated a state notification statute; and (2) the defendant had violated a state rule of statutory construction. The Fourth Circuit Court of Appeals certified both issues to the Virginia Supreme Court. The Supreme Court declared that the notice statute had been violated, and declined to address the statutory construction issue. Because the state court declined to address it, the Court of Appeals vacated the District Court's ruling on that issue as well. *See Potomac Greens*, 6 F.3d at 177.

Thus, both cases went to state law issues, and the federal courts demurred to the highest state courts' rulings. The district court's conclusion on ERISA preemption in *Blue Cross* was no longer valid because the state law did not apply to the plaintiff in the first place. A law cannot be preempted if it does not apply. In *Potomac Greens*, the ordinance was similarly inapplicable by virtue of the defendant's violation of the state notification statute rendering the ordinance void *ab initio*.

Similarly, although it is an open question whether vacatur can appropriately be used to invalidate the precedential effects of decisions, *see, e.g., In re Smith*, 964 F.2d 636, 638 (7th Cir. 1992) ("We vacate unappealable decisions, to prevent them from having a preclusive effect. We do not vacate opinions, to prevent them from having a precedential effect."), it is clear that district court decisions are not binding precedent even within the same district. *See* 18 James Wm. Moore, et al., Moore's Federal Practice § 134.02[1][d]; *Mills v. Apfel*, Civil No. 99-27-P-H, 2000 U.S. Dist. LEXIS 9691, at *2 (D. Me. Mar. 6, 2000). Therefore, because the decision of the District Court in this case can have nothing more than persuasive value, there is once again no compelling reason to grant vacatur in this instance, and the Tribes have failed to supply one. *See Oklahoma Radio Assocs. v. Magnolia Broad. Co.*, 3 F.3d 1436, 1437 (10th Cir. 1993) (refusing to vacate and holding settlement agreement went "beyond the rationale of

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Here, in contrast, the Tribes seek to vitiate a federal court's decision on a question of federal jurisdiction. No state statute or ordinance has been eliminated by virtue of a determinative finding of state law, rendering any other federal court musing on that state statute or ordinance not only hypothetical but an intrusion into state legislation. The appeals presented to the Eleventh and Fourth Circuits were resolved by the state supreme court rulings. Here, the issue on appeal to the First Circuit on the well-pleaded complaint grounds was not eliminated by the Maine SJC's decision. In fact, the Tribes argued vigorously that *res judicata* principles did not apply. The well-pleaded complaint ground for dismissal remained as viable a ground for dismissal as it was in front of the District Court. The SJC decision *added* a ground for the First Circuit to review, as opposed to *eliminating* the need for review, as in the cases noted above.

vacatur" by agreeing to deprive decision of precedential effect); *In re Smith*, 964 F.2d at 638 (holding that courts lack jurisdiction under Article III to vacate decision that has no preclusive effect because parties have no tangible interest in mere precedential effect).

In sum, because the District Court's decisions can have neither issue preclusive nor binding precedential effect, any reason that could justify vacatur in another case does not exist here because there are no binding "legal consequences" to the unreviewed decision. *United States v. Munsingwear*, 340 U.S. 36, 41 (1950). Although the Tribes cite numerous cases where this Court has vacated decisions that could not be appealed through no fault of the parties, they do not cite any authority that the courts should waste resources vacating decisions that have been appealed, and the appellate court determines to affirm the decision below on alternate grounds after reviewing all the issues.

The Tribes' argument, when taken to its logical conclusion, cannot stand under its own weight. They would apparently require, upon a proper motion, that appellate courts vacate every district court decision that is affirmed on alternate grounds. But there is no logical reason to limit their argument at this point. It would seemingly also apply when an appellate court affirms on only one of a district court's alternate, independent grounds, even though the unreviewed ground could have neither preclusive nor binding precedential impact. *See* 18 James Wm. Moore, et al., Moore's Federal Practice § 132.03[4][a] (issue preclusion applies to "only those issues necessary to support the judgment entered in the first action").

Appellate courts acting in equity are not in the business of vacating decisions that do not have binding future effects, and would certainly need a legion of new staff attorneys to attend to such cases if they were. This Court should deny the writ.

II. THERE IS NO REASON TO VACATE THE FIRST CIRCUIT'S DISCUSSION OF THE WELL-PLEADED COMPLAINT RULE ON EQUITABLE GROUNDS.

In addition to seeking to vacate the District Court's decision on the application of the well-pleaded complaint rule, the Tribes also ask this Court to expunge some or all of the First Circuit's decision. (*See* Pet. for Cert. at 27-28.)

As a threshold matter, the Tribes fail to explain exactly what they seek to change about the First Circuit's opinion, and this Court should not be forced to guess. (*See* Pet. for Cert. at 27, alluding generally to a seven-page discussion of the well-pleaded complaint rule at Pet. App. 5-11, and/or language that "could be interpreted as approving the district court's decisions" at Pet. App. 9.) Nor do the Tribes suggest how this Court would go about carving out only those portions of the opinion that the Tribes find objectionable.

As an additional uncertainty, the Tribes twice request that this Court vacate the First Circuit's "judgment" (Pet. for Cert. at 23 & 29), even though they have not appealed the *res judicata* grounds relied upon in the decision to affirm the District Court. Vacating the judgment of the First Circuit would go well beyond addressing the Tribes' stated concerns about the application of the well-pleaded complaint rule.

Regardless what the Tribes seek to expunge from the First Circuit's decisions, they provide no authority for their request. The First Circuit's discussion of subject matter jurisdiction was logical in light of the District Court's decision. It is informed, well-reasoned and provides guidance on a difficult and complex issue, after both sides had a full and fair opportunity to brief the issue.

In any event, the First Circuit stated:

> [W]e are reluctant (despite the urging of the district court that we clear up the matter) to decide in advance of necessity whether a federal claim can be conjured out of a lawsuit by the Tribes asserting that the threatened actions violate the internal affairs limitation contained in Maine law and purportedly ratified by a federal statute. Perhaps there is not even a single answer to this question – it could conceivably turn on the circumstances. *See Penobscot I*, 106 F. Supp. 2d at 83, n.4. In all events, no answer is needed in this case . . . .

(Pet. App. at 11.)

Given that vacatur does not apply to decisions that have no preclusive or binding precedential effect, as discussed above, it strains credulity that this Court would grant certiorari to censor the First Circuit's discussion of jurisdiction. Once again, the Tribes cite no authority for the proposition that vacatur exists to wipe away a discussion that has no binding legal consequences.

Under federal law in the First Circuit, issue preclusion applies only to those elements that are "essential to the judgment." *Hoult*, 157 F.3d at 31 (citing Restatement

(Second) of Judgments § 27). The First Circuit's discussion of jurisdiction was not essential to the judgment, and therefore cannot have preclusive effect. *Id.*; Restatement (Second) of Judgments § 27 cmt. h. Nor do the First Circuit's statements have binding precedential effect. *E.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir. 1992) ("Dictum constitutes neither the law of the case nor the stuff of binding precedent."). Finally, as a practical matter, if vacatur were available to expunge such discussions, this Court would constantly be rewriting opinions to ensure that only whatever it or the Petitioner deemed the core holding remained.

Once again, the Tribes have failed to present compelling authority that the First Circuit's decision conflicts with the decisions of other circuits or has "so far departed from the accepted and usual course of judicial proceedings" as to require this Court to exercise its jurisdiction. Sup. Ct. R. 10(a). The writ should be denied.

III. EVEN IF THIS COURT CHOOSES TO GRANT THE WRIT, A SUMMARY DISPOSITION IS INAPPROPRIATE.

Even if this Court chooses to grant the writ, the summary disposition sought by the Tribes would be inappropriate. (*See* Pet. for Cert. at 3 (asserting "because the First Circuit's error is clear" that "summary disposition is appropriate").) Because they fail to recognize that the District Court's decisions and the First Circuit's jurisdictional discussion have no binding impact, the Tribes wrongly argue that they "are locked out of the federal court." (Pet. for Cert. at 23.) The Tribes apparently

assume that vacatur is automatic, but this Court rejected that approach in *U.S. Bancorp*. *E.g.*, *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995) (stating that automatic vacatur is no longer the established practice in light of *U.S. Bancorp*).

Pursuant to *U.S. Bancorp*, the Tribes, "as the party seeking relief from the status quo of the appellate judgment," must demonstrate "equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 26. "As always when federal courts contemplate equitable relief, [the Court's] holding must also take account of the public interest." *Id.* To grant vacatur automatically, according to the Court, would treat judicial precedents as the private property of the litigants and disturb the orderly operation of the judicial system. *Id.* at 26-27.

As this Court has made clear, the primary route to seek relief from the consequences of a judgment is by appeal as of right and certiorari; the secondary option of vacatur is only available as a stopgap when orderly procedure otherwise fails. *Id.* at 27. No such procedural failure occurred here. The Tribes chose to file a parallel federal suit; the state suit was resolved first; the Court of Appeals had all the circumstances before it when it chose to discuss the well-pleaded complaint rule and base its holding on *res judicata* grounds. Given that the usual rules of preclusion and precedent will ensure that there are no binding legal consequences to the District Court's decisions or the First Circuit's discussion of the jurisdictional issue, and that the Tribes have declined to petition for certiorari on the merits of the decision below, there is

simply nothing present in this case that is urgent (or automatic) enough to justify a summary disposition.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

CATHERINE R. CONNORS
Counsel of Record
MATTHEW D. MANAHAN
BRIAN M. RAYBACK
PIERCE ATWOOD
One Monument Square
Portland, Maine 04101-1110
(207) 791-1100
Counsel for Respondents
Great Northern Paper, Inc., and
Georgia-Pacific Corporation

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STATEMENT OF THE CASE

This case comes before the Court from the decision and order of the Maine Supreme Judicial Court, sitting as the Law Court, affirming in part and vacating in part an order of the Maine Superior Court requiring Petitioners to produce documents pursuant to state law.

In the decision below, the Law Court held that Petitioners must comply in part with a document request served on them by Respondents under Maine's Freedom of Access Act, 1 Me. Rev. Stat. Ann. §§ 401-410 (1989 & Supp. 2000) (hereinafter "FOAA"). The Law Court's ruling that Petitioners are partially subject to and partially exempt from FOAA turned on the Court's construction of the "internal tribal matters" exception to the general rule that, in their governmental capacities, the Penobscot Nation and the Passamaquoddy Tribe (hereinafter "the Tribes") are treated like municipalities. *See* 30 Me. Rev. Stat. Ann. § 6206.[1]

This Court has ruled in the past that the Law Court's interpretation of the scope and applicability of Section 6206's "internal tribal matter" exception does not raise a

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[1] Section 6206 (found at Petitioners' Appendix, hereinafter "Pet. App." at 40), provides in relevant part:

> The Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities . . . and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters . . . shall not be subject to regulation by the State.

sufficiently substantial federal question to warrant this Court's review. *See Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed for want of substantial federal question*, 464 U.S. 963 (1983). The Court should so rule again, and reject the petition for writ of certiorari in this case.

Certain aspects of the factual, procedural, and historical record presented by Petitioners need correction or clarification.

I. THE TRIBES' UNIQUE STATUS

The Law Court's ruling, and interpretation of the Maine Implementing Act, 30 Me. Rev. Stat. Ann. §§ 6201-6214 (West 1996 & Supp. 2000) (hereinafter "MIA"), apply and are relevant solely to Maine Indians, because the status of and rules that apply to these Tribes are unique. *See Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317, 320 (1st Cir. 2001) (Petitioners' status is "atypical.") The Tribes' own counsel noted: "what we wound up with was a blueprint for a governmental relationship between Indians and non-Indians alike – unlike that which exists anywhere else in the United States." (Testimony of Thomas Tureen, Public Hearing Before the Maine Joint Select Committee on Indian Land Claims, dated Mar. 28, 1980, cited in *Stilphen*, 461 A.2d at 488.)

This unique status is the product of two legislative enactments, one state and one federal (collectively "the Settlement Acts"): MIA; and Congress's ratification of MIA in the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1994) (hereinafter "MICSA"). *See Stilphen*, 461 A.2d at 489 (the Settlement Acts "set up a

relationship between the tribes, the State, and the Federal government different from the relationship of Indians in other States to the State and Federal governments.")

The historical backdrop of this legislation and of the relationships between the Tribes and the State of Maine has been exhaustively treated in numerous state and federal cases. *See, e.g., Stilphen*, 461 A.2d at 487-89. The First Circuit has summarized:

> The settlement represented a partial victory for [Petitioners] and Maine: [Petitioners] obtained federal recognition as . . . Indian tribe[s] and received . . . $81.5 million appropriated under the Settlement Act (*see* 25 U.S.C. § 1733) and, in exchange, [Petitioners'] claims against Maine were extinguished. Further, while [Petitioners'] right to self-government was preserved to a limited extent, Maine was permitted to extend its jurisdiction over [Petitioners] to a greater degree than most states exercise over other Indian tribes.

Penobscot Nation v. Fellencer, 164 F.3d 706, 708 (1st Cir. 1999).

The general rule in Maine, unlike anywhere else, is, as Section 6206 expressly provides, that the Tribes enjoy the immunities and bear the responsibilities of a municipality, and are subject to state regulation. *See also* 30 Me. Rev. Stat. Ann. § 6204 (contained in the Appendix hereto, or "Resp. App.," at 4) ("Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them . . . shall be subject to the laws of the State . . . ").

The exception to this general rule applies when an "internal tribal matter" is involved, in which case neither the state nor the federal government may intrude (absent Congressional authorization). *See Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997) (each tribe "in certain capacities functions as a municipality of Maine and is reachable under State and Federal law in that capacity, but when it functions as a tribe as to internal tribal matters, it is not.")

Views differ over whether the Settlement Acts limited or expanded tribal powers, but "this disagreement stem[s] primarily from . . . differing views as to the extent of the tribes' power before the settlement." *Id.* Whatever the situation before the Settlement, general judicial consensus exists as to the Tribes' status *after* passage of the Settlement Acts. The First Circuit's view is that the Settlement Acts preserved the Tribes' right to self-government only "to a limited extent." *See Fellencer*, 164 F.3d at 708. The Law Court agrees. (*See* Pet. App. at 18-19.[2])

This "municipal model" of state regulatory authority, with the "internal tribal matter" exception to state and federal authority (*see id.* at 20), is the result of a compromise in the truest sense. Both the First Circuit and the Law Court recognize that the Tribes surrendered their sovereignty except in limited instances, and in return derived substantial benefits. *See Georgia-Pac. Corp.*, 254 F.3d at 320; Pet App. at 15-17; *Stilphen*, 461 A.2d at 488 n.7. Petitioners' revision of this historical backdrop is an attempt to undo the compromise that the Settlement Acts

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[2] The decision below is set out in full at pages 1-35 of the Appendix to the Petition for Certiorari and is cited herein as "Pet. App.," followed by the Appendix page number.

achieved, the benefits of which the Tribes already have received.

II. RESPONDENTS' INTERACTION WITH THE TRIBES LEADING UP TO THE FOAA REQUESTS

Respondents discharge wastewater into rivers in Maine under federal and state discharge licenses. Pursuant to the National Pollutant Discharge Elimination System ("NPDES") program of the federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (West 1986 & Supp. 2000), the State of Maine has applied to the U.S. Environmental Protection Agency ("EPA") to obtain primary authority to issue all NPDES permits in the State of Maine. (*See* Pet. App. at 2.) In response to the State's application, the Tribes asked EPA to conclude that the State is not entitled to regulate water resources within their territories, because, the Tribes said, they are entitled under Section 1377(e) of the Clean Water Act to be treated like a separate "state." (*See id.* at 3.)[3]

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[3] In their Petition (n.11), the Tribes continue to suggest that this point is factually incorrect. While not relevant to the legal analysis, the limited documents to which Respondents have had access to date indicate the contrary. (*See, e.g.*, Feb. 28, 2000 letter from the Penobscot Nation to EPA (seeking treatment as state ("TAS") status for purposes of grant funding, and asserting that "the Nation has jurisdiction over the resources affected by the program" and that "the Nation has jurisdiction exclusive of the State of Maine over its internal tribal matters"; "As with all land use matters, new construction is within the exclusive jurisdiction of the Nation as an internal tribal matter"); and Sept. 10, 1993 letter from EPA to Penobscot Nation (offering the clarification sought by the Penobscot Nation "as to why this approval of TAS status is limited to the water quality CWA § 106

Thus, Petitioners appear to be taking the position before the EPA that they – and not the State of Maine – should have regulatory authority over water resources that Petitioners contend are within Indian Territory. This position is directly contrary to the express language of the Settlement Acts. *See, e.g.*, 30 Me. Rev. Stat. Ann. § 6204 (Resp. App. at 4) ("Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them . . . shall be subject to the laws of the State . . . ").

At the same time, on March 9, 2000, counsel for the Companies discovered the existence of Tribal Environmental Agreements ("TEAs") between the Tribes and the EPA, executed between June and October 1999. (*See* Record Item No. 14 before the Maine Supreme Judicial Court, in *Great N. Paper, Inc. v. Penobscot Nation*, Docket No. CUM-00-573, at ¶ 6.) These TEAs provide, among other things, that the EPA will make its best efforts to protect from disclosure all communications that have been exchanged between the EPA, other federal agencies, the Tribes, and the parties' representatives, when such communications are requested under the federal Freedom of Information Act ("FOIA"). (*See id.*, ¶ 4.)

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grant purposes and to the water resources over which the Tribe exercises management and protection functions for purposes of the grant activities"), attached as Exhibits E and F to Respondents' Opposition to Motion For Stay, dated August 15, 2001, before the Superior Court.)

III. RESPONDENTS' FOAA REQUESTS AND THE RESULTING LITIGATION

Faced with the Tribes' efforts to convince the EPA to disregard the terms of the Settlement Acts, along with the EPA's agreement to use its best efforts to conceal any ongoing communications with the Tribes, Respondents served state FOAA requests on the Tribes. Respondents' requests sought "documents relating to the Tribes' efforts to gain regulatory powers over water resources within or adjacent to their borders." (Pet. App. at 3.) Respondents seek to view these documents at the Tribal offices "or other reasonable location." (FOAA Requests, found at Ex. A to Complaint, Record Item 1.)[4]

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[4] FOAA provides that the public shall have the right to inspect records during the regular business hours "of the custodian or location of such record." 1 Me. Rev. Stat. Ann. § 408. Thus, it is the decision of the possessor of the record where to maintain those records and allow inspection. Contrary to the Tribes' claims throughout their Petition, Respondents have never insisted on viewing the documents at their reservations; have said so on frequent occasions (*e.g.*, the FOAA requests themselves, Ex. A to Record Item 1); and would in fact prefer to view them off-site, *e.g.*, in the Tribes' attorneys' offices in Portland.

In a letter dated Oct. 17, 2000, Respondents' counsel wrote: "The Penobscot Nation states that we will not be allowed onto Indian Island to review records. This position is unacceptable and not in compliance with the requirements of the FOAA. The FOAA expressly states that 'every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record . . . .' " Consistent with the FOAA requests themselves, counsel thus cited the public's right to view documents where the custodian chooses to locate the records – this may or may not be on the Tribes' territories, as they choose. In any event, as discussed

"After [the Tribes] received notice from [Respondents] but before [Respondents] could get to state court under the statutorily required waiting period, [the Tribes] filed [a] federal lawsuit against [Respondents] seeking an injunction against any state court lawsuit and a declaratory judgment that the Maine Freedom of Access Act violates 'their federal right to be free of such state regulation.' " *Penobscot Nation v. Georgia-Pac. Corp.*, 106 F. Supp. 2d 81, 82 (D. Me.), *reconsideration denied*, 116 F. Supp. 2d 201 (D. Me. 2000), *aff'd on other grounds*, 254 F.3d 317 (1st Cir. 2001).

Petitioners rejected Respondents' FOAA requests, declaring that no aspect of FOAA applied to them, "because 'the application of that law . . . would amount to state regulation of [the Tribes'] governmental process, policies, and procedures.' " (Pet. App. at 5; ellipsis and square brackets in original.) The Tribes offered to produce records in their possession that were not confidential under Petitioners' unspecified tribal laws and policies or otherwise protected from disclosure under Maine's discovery and evidentiary rules. (*See id.*)

Because the Tribes thus declined to allow inspection, Respondents, following the procedure set forth in 1 Me. Rev. Stat. Ann. § 409(2), filed a suit in state court to compel production. Shortly thereafter, Respondents filed a motion for partial summary judgment. (Pet. App. at 5.) The purpose of Respondents' motion for partial summary judgment was to resolve the primary basis raised by the

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infra, this point is academic, because the Law Court never ordered any access to tribal lands, but only that the Tribes produce copies of certain documents.

Tribes for rejecting the FOAA request: that MIA's "internal tribal matters" exception removed any duty by the Tribes to respond under FOAA. The motion was only for partial summary judgment, because the Tribes had also alluded to an attorney-client privilege/work product claim as to unidentified documents.

The Tribes opposed the motion for partial summary judgment and moved to dismiss the state court action, claiming that the state court lacked subject-matter jurisdiction, and that application of FOAA to them would amount to regulation of "internal tribal matters," in violation of MIA. (*See id.* at 6.)

On September 19, 2000, the Superior Court (Crowley, J.) rejected the Tribes' motions and granted the Companies' motion for partial summary judgment. (*See id.* at 76.) Citing First Circuit decisions such as *Fellencer* and *Akins*, the Superior Court found that the document requests did not intrude upon an "internal tribal matter" within the meaning of MIA, because the subject matter of the requests (water regulation) affected non-tribal members and implicated state authority and interests. (Pet. App. at 75.)

In order to facilitate immediate appeal, Justice Crowley entered an order giving the Tribes two weeks to: (1) produce the documents over which no attorney-client privilege/work product was claimed; and (2) provide a privilege log as to the remaining documents. (*See id.*) The Tribes filed a motion for reconsideration, which Justice

Crowley denied on September 27, 2000. (*See* Resp. App. at 17, entry dated Sept. 28, 2000).[5]

The Tribes were equally unsuccessful on the federal front. The United States District Court for the District of Maine (Hornby, C.J.) dismissed that suit for lack of subject matter jurisdiction under the well-pleaded complaint rule. *See Penobscot Nation*, 106 F. Supp. 2d at 86. Once again, the Tribes filed a motion to reconsider, pursuant to which Judge Hornby again found jurisdiction lacking. *See Penobscot Nation v. Georgia-Pacific Corp.*, 106 F. Supp. 2d 81 (D. Me.), *reconsideration denied*, 116 F. Supp. 2d 201 (D. Me. 2000).

IV. PROCEEDINGS SUBSEQUENT TO THE ORDER TO PRODUCE DOCUMENTS

The Tribes did not appeal Justice Crowley's September 19, 2000 order. Nor did they choose to comply with the order. They did not file a privilege log, nor seek any extension of time to do so. They produced no documents. They chose to do nothing, openly defying the Superior Court.

With neither an appeal nor compliance forthcoming from the Tribes, Respondents filed motions for entry of final judgment and for contempt. (*See* Resp. App. at 17, entry dated Oct. 10, 2000). After a hearing on October 18, 2000, Justice Crowley granted the motion for final judgment, because the Tribes' failure to respond in any way to the September 19, 2000 order constituted a waiver of any

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[5] A certified copy of the trial court docket was before the Law Court as part of the parties' jointly filed Appendix. A copy of that certified docket is included in the Appendix to this Brief.

assertion of attorney-client privilege or application of the work product doctrine. (*See* Pet. App. at 6-7.)

The Superior Court did not rule, however, on the motion for contempt. Rather, it continued the action for an evidentiary hearing on November 9, 2000, in order to give the Tribes more time to comply with the order to produce documents or file an appeal of the now final judgment. (*See* Resp. App. at 7, entry dated Oct. 20, 2000.)[6]

The Tribes responded to this allowance of more time to appeal or comply by suing Justice Crowley in federal court. *See Penobscot Nation v. Honorable Robert E. Crowley*, Civil No. 00-222-B-S (D. Me. Oct. 31, 2000). Judge Carter rejected their motion for preliminary injunction; the Tribes withdrew the suit and sought an expedited appeal of Judge Hornby's dismissal. *See id.*, Order dated Nov. 6, 2000 at 2.

In the state court forum, the Tribes continued to defy the Superior Court, neither complying with its order nor appealing from it. This left Justice Crowley with no choice on November 9, 2000 but to find the Tribes in contempt.

Justice Crowley ordered coercive imprisonment of the three tribal leaders named as parties before him and coercive fines against the Tribes themselves. Yet one more time, however, the state court gave the Tribes another chance. Justice Crowley ordered that any fines or imprisonment would be suspended pending any appeal to the Law Court; as to the individual tribal leaders, he

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[6] The filing of an appeal in Maine automatically stays execution of judgment. Maine Rule of Civil Procedure 62(a).

further ordered that the sentences of coercive imprisonment should be stayed until November 13, 2000, to give them another opportunity to appeal or comply. (*See* Resp. App. at 26.)

Finally, on the last available day, November 13, 2000, having delayed proceedings in state court as long as possible without subjecting their leaders to actual imprisonment, all the while accelerating the federal appeal, the Tribes filed their Notice of Appeal of Justice Crowley's final judgment. (*See* Resp. App. at 28-29.)

The Law Court ruled on that appeal on May 1, 2001. (*See* Pet. App. 1-36.) Surveying the legislative history and case law in depth, the Law Court affirmed in part and vacated in part Justice Crowley's order to produce documents, vacated Justice Crowley's contempt order, and remanded to Justice Crowley to resolve any remaining disputes over the scope of the Tribes' obligation to produce documents. (*See id.* at 33-34.)

Both the Superior Court and the Law Court concluded that MIA's "internal tribal matters" exception did not blanketly preclude any application of FOAA. While Justice Crowley had focused primarily on the subject matter of the FOAA request to determine whether the exception was implicated, the Law Court focused on the processes associated with creation of the documents. Documents, such as minutes of tribal meetings, reflect "deliberative processes of self-government," the Law Court reasoned, and, therefore, are excluded from production. In contrast, other documents, such as inter-governmental communications from the Tribes to the EPA, do not form a part of the internal tribal governmental process; therefore, the exception does not apply. (*Id.* at 31-34.)

On May 31, 2001, the Law Court denied the Tribes' request for reconsideration. (*See* Pet. App. at 36.) On June 20, 2001, the First Circuit (Boudin, C.J.) affirmed the dismissal of the Tribes' federal suit, on the grounds that the final judgment in the state court was entitled to full faith and credit in the federal court and would bar the injunctive relief that the Tribes requested in the federal suit. *See Georgia-Pac. Corp.*, 254 F.3d at 325. The First Circuit denied the Tribes' request for rehearing and for rehearing en banc on August 24, 2001. *See Penobscot Nation v. Georgia-Pac. Corp.*, Docket No. 00-2265, orders dated Aug. 24, 2001 (1st Cir.).

The FOAA requests are currently pending before the Maine Superior Court on remand. The Law Court ordered that Petitioners be given a reasonable time to comply with its order of production. Orally, the Superior Court on September 6, 2001 ordered that he would grant a stay of actual production of documents pending resolution of this certiorari petition, while requiring the parties to brief the remand issues clarifying the exact documents to be produced.

Throughout this 19-plus month process, Respondents have consistently sought expedition, since the documents could prove relevant to the EPA's pending NPDES decision, which could issue at any time.

Supreme Court, U.S.
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No. 01-723

In The

Supreme Court of the United States

PENOBSCOT NATION; PASSAMAQUODDY TRIBE; BARRY L. DANA, in his capacity as Chief of the Penobscot Nation; RICHARD M. DOYLE, in his capacity as Governor of the Passamaquoddy Tribe; and RICHARD STEVENS, in his capacity as Governor of the Passamaquoddy Tribe,

Petitioners,

v.

GEORGIA-PACIFIC CORPORATION; GREAT NORTHERN PAPER, INC.; INTERNATIONAL PAPER COMPANY; and the STATE OF MAINE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

Riyaz A. Kanji
Kanji & Katzen, PLLC
201 South Main Street
Suite 1000
Ann Arbor, Michigan 48104
(734) 769-5400

Kaighn Smith, Jr., Esquire
Counsel of Record
Gregory W. Sample
Drummond Woodsum & MacMahon
245 Commercial Street
Portland, Maine 04101
(207) 772-1941
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF

Respondents' Brief in Opposition is a work of obfuscation. The First Circuit's action below puts it in direct conflict with other circuits and marks a significant departure from the usual course of judicial proceedings.

1. In an attempt to avoid the equitable basis for the application of *Munsingwear* and its progeny here – the Tribes' inability to attain appellate review of the district court's "well-pleaded complaint rule" decisions in *Penobscot I* and *Penobscot II* by the happenstance of the Maine Supreme Judicial Court's winning the "race" to judgment – Respondents make the unfounded assertion that the First Circuit affirmed those decisions on the "alternate" ground of *res judicata*. They gloss right over the fortuity of the intervening event depriving the Tribes of appellate review by suggesting that *res judicata* was "in front of" the district court. *See Respondents' Brief in Opposition* ("*Opp.*") at 9, 12 n.4, 13. It was not. The issue of *res judicata* is nowhere to be seen in the decisions of the district court or in any of the briefs filed there. *See Petition Appendix* ("*Pet. App.*") at 16-38 (decisions); *First Circuit Docket 00-2265*, Record Items 5, 16, 26, 29, 30, 32 (briefs). In the First Circuit, the *res judicata* consequence of the Maine SJC's decision was a fortuity that eliminated the need to entertain the Tribes' appeal. That "intervening decision," the First Circuit said, rendered the Tribes' "federal suit superfluous" and thereby eliminated any need to review the "difficult" questions presented by the Tribes' appeal. *Id.* at 5, 12, 15.

This is the classic setting for application of this Court's equitable rule of vacatur. It should be applied to

prevent the district court's "well-pleaded complaint rule" decisions in *Penobscot I* and *Penobscot II*, "unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). *Accord U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 & n.3 (1994). The First Circuit's failure to apply the rule departs from "the accepted and usual course of judicial proceedings" and, therefore, warrants a grant with summary disposition under this Court's supervisory power. *See* SUP. CT. R. 10(a). That has been the standard practice in this Court in myriad cases presenting this problem. *See generally* 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.10 n.11 (2d ed. 1984 & Supp. 2001) (citing 30 cases).

2. Contrary to Respondents' view, the First Circuit's rejection of the Court's vacatur rule in the circumstances presented splits it off from other circuits and warrants the writ of *certiorari* if the Court does not summarily grant the writ and issue a vacatur order.

The First Circuit has interpreted this Court's vacatur rule to require more than just mootness of the issue presented on appeal due to underlying mootness of a federal case. The First Circuit requires mootness of the parties' controversy in other forums. *See Pet. App.* at 41 (rejecting vacatur because "the controversy continues . . . to be litigated in state court"). In other circuits, mootness of the issue presented on appeal and the parties' federal case is enough to invoke the rule. As described in the Petition, that is what occurred in *Blue Cross & Blue Shield of Alabama v. Nielsen*, 142 F.3d 1375 (11th Cir. 1998) and *Potomac Greens Associates v. City*

Council, 6 F.3d 173 (4th Cir. 1993). That is also what occurred in *Exxon Corp. v. Heinze*, 32 F.3d 1399 (9th Cir. 1994), where the parties continued their controversy in a state court and the Ninth Circuit vacated district court decisions independent of (but related to) that controversy, which were mooted by a partial settlement. *See id.* at 1403, 1405.

Respondents attempt to align the First Circuit with the Eleventh Circuit in *Blue Cross* and the Fourth Circuit in *Potomac Greens* by arguing, in a footnote, that "the issue on appeal to the First Circuit on the well-pleaded complaint grounds was not eliminated by the Maine SJC's decision. . . . The SJC decision *added* a ground for the First Circuit to review, as opposed to *eliminating* the need for review, as in [*Blue Cross* and *Potomac Greens*]." *Opp.* at 12 n.4 (emphasis in original).

Obviously, this is not how the First Circuit reasoned.

According to the First Circuit, the *res judicata* effect of the Maine SJC's "intervening" decision *eliminated* the need for review. Since that decision rendered the Tribes' federal case moot, the First Circuit simply would not "decide *in advance of necessity*" the Tribes' appeal of *Penobscot I* and *Penobscot II*. *Pet. App.* at 11 (emphasis added).[1] In other words, the First Circuit did not entertain the Tribes' appeal at all. Rather, its disposition was a

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[1] The First Circuit most certainly decided that the happenstance of the Maine SJC's "race" to judgment eliminated *the necessity* of examining *Penobscot I* and *Penobscot II*. That happenstance, under the First Circuit's reasoning, gave it an "out" by undermining the justiciability of the Tribes' federal case under principles of *res judicata*. *See Pet. App.* at 14-15. Had that not occurred, the First Circuit would have had a duty to

de facto dismissal of their appeal on the ground that *their federal case* became nonjusticiable (or "moot") with the advent of the Maine SJC's decision. In other circuits, when appellate review is lost in a manner such as this, vacatur is required. *See, e.g., Blue Cross,* 142 F.3d at 1376-77; *National Black Police Ass'n v. District of Columbia,* 108 F.3d 346, 354 (D.C. Cir. 1997); *Jones v. Temmer,* 57 F.3d 921, 923 (10th Cir. 1995); *Exxon Corp. v. Heinze,* 32 F.3d at 1405; *Potomac Greens Associates,* 6 F.3d at 177.

3. This leads to the relief the Tribes seek from this Court. Respondents incorrectly state that the Tribes ask this Court "to expunge some or all of the First Circuit's decision." *Respondents Brief in Opposition* at 14. They do not. *See Petition.*

Under the *Munsingwear* doctrine, as applied in other circuits, the elimination of the Article III case or controversy in federal court brought about by the happenstance of the Maine SJC's intervening decision would warrant *dismissal* of the Tribes' appeal, an order *vacating* the unreviewed decisions that the Tribes sought to appeal, and a remand order to dismiss the federal case as moot (for want of a justiciable case or controversy). *See, e.g., National Black Police Ass'n,* 108 F.3d at 354 (appeal moot when legislature amended state law that was the subject

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address the sole question adjudicated in *Penobscot I* and *Penobscot II*: whether the Tribes' case "arose under" federal law for the purposes of 28 U.S.C. § 1362 and 28 U.S.C. § 1331. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998) (courts are required to address questions of subject matter jurisdiction). *See also Pet. App.* at 14-15 (discussing *Steel Co.*).

of constitutional challenge in federal court); *Jones v. Temmer*, 57 F.3d at 923 (same). *See also Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73-74 (2nd Cir. 1991) (same result when unilateral action of appellee moots appeal).

This is what the Tribes seek here. They do not ask this Court to selectively expunge parts of the First Circuit decision. They simply ask this Court to (1) vacate the First Circuit's judgment affirming the district court and (2) remand the case to the First Circuit with instructions to vacate the rulings of the district court in *Penobscot I* and *Penobscot II*. *See Petition* at 23, 29. Certainly, under the First Circuit's *res judicata* rationale, which the Tribes do not challenge in their Petition, the Tribes' appeal of *Penobscot I* and *Penobscot II* became moot when the intervening Maine SJC decision "foreclose[d]" the relief they sought in the district court. *See Pet. App.* at 15. Thus, the First Circuit's decision would stand as the basis for dismissing the Tribes' appeal and remanding the case to the district court for dismissal for want of a justiciable case. (And this Court can so specify on remand.) What cannot stand under *Munsingwear* and its progeny, however, is a First Circuit judgment that leaves intact the district court's unreviewed rulings in *Penobscot I* and *Penobscot II*, holding that the Tribes are barred from proceeding to federal court under the "well-pleaded complaint rule."[2]

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[2] As the Tribes pointed out in the Petition, this issue is no small matter. They sought to invoke the federal court's jurisdiction pursuant to, *inter alia*, 28 U.S.C. § 1362, which Congress enacted for the express purpose of giving Indian tribes a federal forum, *in preference to a state forum*, for resolving controversies concerning their rights of self-government. *See Petition* at 26 (citing cases). By winning their concerted "race" to

Under this Court's equitable rule of vacatur, the Tribes must have a clear path to litigate that issue in the future. *See U.S. Bancorp*, 513 U.S. at 25; *Munsingwear*, 340 U.S. at 40-41.[3]

For all of the above reasons, as well as those set forth in the Petition, the Court should grant the writ of *certiorari*, summarily vacate the First Circuit's judgment, and remand the case to the First Circuit with instructions to vacate *Penobscot I* and *Penobscot II*, or, in the alternative, grant the writ and proceed in the ordinary course.

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a state court judgment, Respondents successfully precluded appellate disposition of the Tribes' right to invoke the jurisdiction of the federal court in such a controversy. *See Petition* at 10-11, 22. Not only has the "happenstance" of the state court's race to judgment deprived the Tribes of appellate review, but efforts by the Respondents pushed the eventuality of that happenstance. *See id.* Respondents would now block a "clear path" for the Tribes to litigate their access to federal court notwithstanding their loss of appellate review. The equities are clear.

[3] The Respondents' cryptic argument that application of this Court's vacatur rule should turn on whether a particular decision is preclusive or not is unsupported. They cite no case that stands for such a proposition, and existing authority is to the contrary. In *Jones v. Temmer*, 57 F.3d 921, for instance, the Tenth Circuit rejected "out of hand" an assertion that the government's interest in "having the lower court opinion available as precedent" is a factor for consideration in the application of this Court's vacatur rule. *Id.* at 923 n.1.

Respectfully submitted,

KAIGHN SMITH, JR., ESQUIRE
Counsel of Record
GREGORY W. SAMPLE
DRUMMOND WOODSUM & MACMAHON
245 Commercial Street
Portland, Maine 04101
(207) 772-1941
Counsel for Petitioners

RIYAZ A. KANJI
KANJI & KATZEN, PLLC
201 South Main Street
Suite 1000
Ann Arbor, Michigan 48104
(734) 769-5400